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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 195

THE STATE OF COLORADO, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and The Colorado and Southern Railway Company, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES

OPINIONS

Circuit Judge Lewis and District Judges Symes and Phillips (R. 45) denied application for injunction and dismissed the petition without opinion (R. 41). The commission filed three reports, *Abandonment of Branch Line by Colorado & Southern Railway,* 72 I. C. C. 315; 82 I. C. C. 310; 86 I. C. C. 393.

JURISDICTION

The suit was commenced and the appeal was taken under Commerce Court Act, Ch. 309, 36 Stat. 539, and Urgent Deficiencies Act, Ch. 32, 38 Stat. 219, 220. The latter provides, "A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree," * * *.

STATEMENT

This appeal challenges the validity of the certificate of the Commission which authorizes Colorado & Southern Railway to abandon a segment of narrow gauge railroad, 29.42 miles in length and practically without traffic, located in an extremely rugged and mountainous region in Colorado, the continued operation of which creates mounting deficits.

The Colorado & Southern Railway Company, with its principal office in Denver, was organized under the laws of Colorado as a common carrier by railroad (R. 23, 24). Its main-track operated mileage, exclusive of side, industrial, switching, or yard tracks, is approximately 1,100 miles, with 144 miles in Wyoming, 83⅓ miles in New Mexico, and 872 miles in Colorado (R. 24). The main line extends from Wendover, Wyoming, where it connects with the main line of the Burlington, to Sixela,

N. M., where it connects with main line of Ft. Worth & Denver City, a distance of 588 miles, 134 in Wyoming, 83⅓ in New Mexico, and 370¾ in Colorado (R. 24). It also operates 291 miles of narrow gauge in Colorado (R. 24).

On November 30, 1921, the general balance sheet showed capital stock $48,000,000, of which $17,000,000 is preferred stock and $31,000,000 is common stock; unmatured funded debt, $49,358,900; investment in road and equipment, $79,280,888.66; profit and loss credit balance, $5,397,840.91. For the five years, January 1, 1916, to December 31, 1920, the net railway operating income totaled $13,723,554. For the first 11 months of 1921 the operations resulted in a net operating income of $1,869,401 (R. 19). In the last four or five years traffic on the line has largely decreased (R. 19).

On September 1, 1921, Colorado & Southern applied to the Interstate Commerce Commission, pursuant to paragraph (18) of section 1 of the Interstate Commerce Act (Ch. 91, 41 Stat. 477), for a certificate of public convenience and necessity authorizing it to abandon a segment of narrow gauge line (R. 16), located in an extremely rugged and mountainous territory in Chaffee County, Colorado, and extending from Buena Vista to Romley, a distance of 29.42 miles (R. 16). The equipment consists of one locomotive, one combination baggage car and passenger coach, and a few box, coal, and flat cars (R. 17). The service consists of a mixed train which makes the round trip

three days a week (R. 17). There are several small communities along the branch which are not served by any other railroad. The total population of the tributary territory is estimated at 993. Buena Vista, which is served both by the branch and the Denver & Rio Grande, has 903 of the total, leaving only 90 up the line.

Colorado & Southern submitted a statement covering operations of the branch from January 1, 1916, to November 30, 1921, showing operating revenues, $80,603.50; operating expenses, $185,912.74; taxes, $106,716.87; interest, $145,550; total deficit, $357,576.11. Thus, over 70% of the total deficit consists of charges to interest and taxes. The branch is subject to Colorado & Southern's first mortgage, under which $19,400,000 in bonds are outstanding; and to its refunding and extension mortgage, under which $28,978,900 in bonds are outstanding (R. 18). The proposed abandonment would not reduce interest charges (R. 18), and there is doubt as to how much, if at all, taxes would be reduced (R. 19).

After a hearing, the commission, on July 28, 1922, observed that the operation of the line for the past four or five years had resulted in substantial losses (R. 19), and temporarily denied the application in the following words (R. 20): "Upon the facts presented we are unable to find that the present and future public convenience and necessity permit the abandonment of the branch line of railroad in question. If the improvement in operating

results, confidently anticipated by protestants, should not materialize within a reasonable period of time, the applicant may renew its application. It is not in the public interest that even a strong line like the applicant should permanently operate parts of its system that do not yield revenues sufficient to pay operating expenses and interest on the net scrap value of the property. Persons directly interested in the continued operation of the line should cooperate to the fullest extent possible with the management of the road with the view of effecting more favorable operating results."

On May 19, 1923, Colorado & Southern filed a petition to reopen the case, which was granted. Further hearing established that the anticipated improvement in operating results had not materialized (R. 22). For the year 1922 operating revenues were $5,813.91, operating expenses $30,654.28, and taxes $28,838.42. For the first five months of 1923 operating revenues were $1,788.18; operating expenses, $15,401.79; and taxes, $12,016.01. The total tonnage transported in 1922 was 1,865 tons, and in the first five months of 1923 357 tons (R. 22). In an endeavor to increase the traffic, in the latter part of 1922 the rate on ore to the smelter at Leadville was reduced 50 cents a ton (R. 22). Unusually severe winter, shopmen's strike, and failure of owners and operators of mines to invest money in their properties were asserted by protestants as reasons for further time

for developments (R. 22), and their case then rested largely upon "optimistic predictions and hopes" (R. 22). The commission said, "upon the facts presented we find that the present and future public convenience and necessity permit the abandonment of the branch line of railroad in question" (R. 22). On September 24, 1923, certificate was issued accordingly (R. 23).

On February 11, 1924, the commission filed its third report on further argument (R. 7). Reaffirming its former findings and action, the commission further found that from January 1, 1916, to May 31, 1923, the operating results of the branch were, operating revenues $88,588.04, operating expenses $236,185.04, and taxes $157,244.35. It did not appear how much the taxes would be reduced through the proposed abandonment, and by eliminating that item the deficit in net operating revenues was $147,597. Except superintendence, practically all operating expenses are direct charges to the branch (R. 8). The operating revenues decreased from $25,507.68 in 1916 to $5,813.91 in 1922, and to $1,788.18 for the first five months of 1923. The number of passengers carried decreased from 3,711 in 1916 to 725 in 1922, and to 185 in the first five months of 1923 (R. 8). There was no assurance that future operations would show a more favorable result (R. 8). Colorado & Southern's net railway operating income for 1921 and 1922 was $1,903,793.39 and $1,061,877.35, re-

spectively. The large losses sustained in operating the branch line "would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce." The commission said that "upon the facts presented we affirm the findings in our former report, 82 I. C. C. 310, and find that the present and future public convenience and necessity permit the abandonment by the applicant of the branch line of railroad in question" (R. 9). Accordingly, on February 11, 1924, the amended certificate of public convenience and necessity was issued (R. 11), effective six months from the date thereof, the same to replace the previous certificate.

The State of Colorado then filed the petition, July 15, 1924 (R. 1), and charged the order was void because of (*a*) lack or inadequacy of evidence; (*b*) insufficient findings; (*c*) violation of contract between Colorado & Southern and the State (*d*) inclusion of intrastate commerce; and (*e*) failure of the State to consent to the terms of the certificate. Injunction was prayed against the enforcement of the order or the carrying out of the same (R. 6).

The United States (R. 39), the commission (R. 12), and Colorado & Southern (R. 23) filed separate answers, and after hearing (R. 45) the petition was dismissed on final decree (R. 41).

STATUTE

Paragraphs (18), (19), (20), (21) and (22) (Ch. 91, 41 Stat. 477), section 402 (Ch. 91, 41 Stat. 476), Transportation Act, 1920 (Ch. 91, 41 Stat. 456), follow in *extenso*.

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this act shall apply to all such proceedings. Upon

receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of

this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to or permits any violation of the provisions of this paragraph or of paragraph (18) of this section shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this act and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the commission finds, as to such extension, that it is reasonably required in the interest of such public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this act which refuses or neglects to comply with any order of the commission

made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

QUESTION

On the undisputed important facts had the commission power to issue in its present form the amended certificate of public convenience and necessity?

ARGUMENT

SUMMARY

I. The report of the House Committee on Interstate and Foreign Commerce indicates the full reasons and purposes for the enactment of the statute which was a regulation of interstate commerce (*Stafford* v. *Wallace*, 258 U. S. 495, 512, 513; *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 463; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 316, 320; *Standard Oil Co.*

v. *United States,* 221 U. S. 1, 50; *United States* v. *Wabash Railway,* January 18, 1926).

II. The statute was a valid exercise of Congressional power (*State of Texas* v. *Eastern Texas Railroad,* 258 U. S. 204; *Railroad Commission* v. *Eastern Texas Railroad,* 264 U. S. 79).

III. The staggering deficits in the operation of the Buena Vista-Romley branch constitute such a drain on an artery of interstate commerce as to call for the issuance of the certificate (*State of Texas* v. *Eastern Texas Railroad,* 258 U. S. 204; *Railroad Commission* v. *Eastern Texas Railroad,* 264 U. S. 79).

IV. In *State of Texas* v. *Eastern Texas Railroad,* this Court said of the Eastern Texas Railroad, thus clearly distinguishing it from the case at Bar (258 U. S. 217), "It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce." These words precisely describe the situation in the present case and the commission acted accordingly (R. 22, 82, I. C. C. 311; R. 9, 86 I. C. C. 395).

V. The fact that commerce both interstate and intrastate may move over the branch does not invalidate the certificate (*United States* v. *Village of Hubbard,* 266 U. S. 474; *Railroad Commission of Wisconsin* v. *C., B. & Q. R. R.,* 257 U. S. 563; *State of New York* v. *United States,* 257 U. S. 591;

Shreveport Case, 234 U. S. 342; *American Express Co.* v. *Caldwell,* 244 U. S. 617; *United States* v. *State of Tennessee,* 262 U. S. 318).

VI. The contract claimed between the State and Colorado & Southern may not prevail against the paramount power of Congress through the Commission to regulate interstate and foreign commerce (*State of New York* v. *United States, supra; United States* v. *Village of Hubbard, supra*).

I

THE LIGHT OF THE ENVIRONMENT IN WHICH CONGRESS PASSED THE EXTENSION AND ABANDONMENT ACT

Congressman Esch (Wisconsin), Chairman House Committee on Interstate and Foreign Commerce, on November 11, 1919, in reporting the Railroad Bill to the Committee of the Whole House on the State of the Union, said:

> In section 402 we treat of extensions and abandonments. We believe one main cause of the so-called " weak sister " has been the unrestricted right of railroads to be built wherever their projectors thought fit. As a result of this unrestricted right we find in all States of the Union cases where, after a road has been built and long maintained and has gotten its traffic well established, another road puts in a parallel line with the usual result that instead of having one strong road doing the traffic we have two weak roads, as they have to charge the same rate between

competitive points, and we burden the public by compelling it to sustain two weak roads when one strong road would have been sufficient.

How does this bill stop that? In this way: Before a road or an extension thereof can be built it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the building of a single rod of the extension or of the new line. That means that the commission must first investigate the situation. It must first consult the communities that would be connected or would be located on the proposed line. It must consult the shipping interests and producing interests and all other interests that might be involved and then determine whether or not it should issue a certificate of convenience and necessity.

This is not new law. Several of the States have this same kind of law now, notably the State of New York and the State of Wisconsin and other States, and the law has worked successfully. It has prevented the construction of new lines that could not by any possibility have any hope of meeting operating expenses, not to say anything about profits. It would prevent the construction of some of these short lines which may have no hope of ultimate financial success. In every way we have felt that this provision would lessen the number of "weak sisters," would prevent the creation of any new ones, and would strengthen the exist-

ing lines. We can get better service by strengthening the existing line than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments. We have also provided for abandonments.

Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out to the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones, affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong (Con. Rec., vol. 58, pt. 8, 8309, 8316).

In *Stafford* v. *Wallace*, 258 U. S. 495, 512, 513, in sustaining the constitutionality of the so-called Packers and Stockyards Act of 1921 (Ch. 64, 42 Stat. 159), this Court, speaking through Mr. Chief Justice Taft, said:

> We have framed the statement of the case, not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees on Agriculture in Congress, but only to enable us to consider and discuss the act whose validity is here in question in the light of the environment in which Congress passed it. It was for Congress to decide from its general information and from such special evidence as was brought before it the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted (*Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *Danciger* v. *Cooley,* 248 U. S. 319, 322).

This statute is a regulation of interstate commerce. By the Transportation Act of 1920 it was passed as an amendment to the Interstate Commerce Act. It should therefore be construed as an amendment and not as a new and original act.

The Transportation Act of 1920 " introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy,* 257 U. S. 563, 585. * * * The new purpose was expressed in unequivocal language, and to attain it, new rights, new obligations, new machinery, were created. The new pro-

visions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service." *New England Divisions Case,* 261 U. S. 184, 189.

The one subject above all others with which the Transportation Act deals is the *revenue* of the carriers.

In *Terry* v. *Anderson,* 95 U. S. 628, 634, this Court, speaking through Mr. Chief Justice Waite, said:

> The business interests of the entire people of the State had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments and permit a reorganization upon the basis of the new order of things.

The foregoing section is closely interlocked with other equally important sections, all of which make up the complete scheme of legislation frequently referred to by this Court. References to other sections are set forth in Appendix A.

II

THE ENACTMENT OF THE STATUTE WAS A VALID EXERCISE OF CONGRESSIONAL POWER

These particular portions of the statute received the mature deliberation of this Court after full arguments in *State of Texas* v. *Eastern Texas Railroad,* 258 U. S. 204. Eastern Texas Railroad, a

Texas corporation, owned and operated *in that State* a line of railroad 30.3 miles in length. Three-fourths of its traffic moved in interstate and foreign commerce and the remainder in intrastate commerce (258 U. S. 214). The company neither owned nor operated any other line and claimed to be operating at a loss. On application and after hearings the Interstate Commerce Commission issued the certificate of public convenience and necessity for abandonment of the line. In appropriate equity proceedings the State of Texas claimed that the Transportation Act did not afford any basis for granting a certificate sanctioning the abandonment of the company's line as respects intrastate commerce, and if it did it was unconstitutional as an encroachment on the reserved powers of the State (258 U. S. 216). This Court then stated the question, "The only matters in controversy are whether, by paragraphs 18, 19, and 20, Congress has assumed to clothe the Commission with authority to sanction *the entire abandonment of a road such as this,* and if so, whether the power of Congress extends so far " (italics ours) (258 U. S. 216).

In holding that the certificate should be restricted so as to include interstate and foreign commerce only, this Court, speaking by Mr. Justice Van Devanter, said:

> The road lies entirely within a single State, is owned and operated by a corporation of that State, *and is not a part of an-*

other line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce *will not be burdened or affected* by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.

If paragraphs 18, 19 and 20 be construed as authorizing the commission to deal with the abandonment *of such a road* as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this Court has said, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter" (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407–408).

Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road *like the one we*

> *have described.* Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act, they are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce (*Minnesota Rate Case,* 230 U. S. 352, 418; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563). And had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared. This was not done (italics ours).

With the single exception of *Colorado & Southern* v. *Railroad Commission,* 54 Col. 64, 90, 91, 93, opposing counsel cite neither case nor statute of the State to sustain any right claimed by the State or any proposition which they have argued. That case is cited to support the undisputed but inapplicable proposition that railways are organized and

operated not for the profit of the company alone, or that of its stockholders, but for the benefit of the public as well (Br. 15, 24, 25). With equal force it may be said that the issuance of the certificate is in the public interest; at least the commission, the body " appointed by law and informed by experience," has so determined after three hearings.

In *Railroad Commission* v. *Eastern Texas Railroad,* 264 U. S. 79, 85, this Court, in affirming decrees of the District Court, authorized the Eastern Texas Railroad to withdraw from instrastate commerce and to dismantle and abandon its road as a losing venture. In that case the State relied on two statutory provisions of the State, neither of which was held sufficient. The principle reaffirmed by that case is thus stated in the opinion by Mr. Justice Van Devanter:

> So long as the railroad company " continues to exercise " the privileges conferred by its charter the State has power to regulate its operations in the interest of the public, and to that end may require it to provide reasonably safe and adequate facilities for serving the public, even though compliance be attended by some pecuniary disadvantage (*Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission,* 206 U. S. 1, 26; *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262, 279; *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission,* 242 U. S. 603, 607). But this rule in nowise

militates against the principle that the company may withdraw its property from use by the public " when that use can be kept up only at a loss" (*Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana, supra*).

Even if there were contractual relations, statutory, charter, or other, between the Colorado & Southern and the State, they may not prevail over the paramount power of Congress through the Commission to regulate interstate and foreign commerce (*State of New York* v. *United States*, 257 U. S. 591; *United States* v. *Village of Hubbard*, 266 U. S. 474).

If the State has power to prohibit the abandonment of the Buena Vista-Romley branch and to compel the continued operation thereof, what may happen? Every trunk-line interstate railroad operating in two or more States must, in each instance, separately apply to the Interstate Commerce Commission and to the State for a certificate of public convenience and necessity to abandon any useless branch, however unprofitable, and, in each instance, any action of either authority may be reviewed by the courts. Moreover, the same course must necessarily be pursued with respect to applications for similar certificates to construct extensions or new lines. Construction of new lines and extensions and the abandonment of old lines or branches are treated as one subject, and under

the regulatory power, whether State or Federal, the same procedure applies to each.

The commission has found, and the undisputed facts show, the mounting deficits in the continued operation of the branch. Colorado & Southern is concededly an interstate carrier, with its property located in three States. The operation of the branch is and has been a serious drain upon the resources of the company. Even if a segregation of the intrastate commerce from the interstate commerce were possible, the operation of the branch for intrastate commerce alone obviously would create far greater deficits than those which now exist and the drain on the artery of interstate commerce would go on. If the power of Congress and the authority of the Commission are not now supreme, then it is within the power of the States in which the Colorado & Southern operates to destroy it. To restrict the certificate so as to include intrastate commerce only means that this trunk-line carrier, operating in three States, must try its case anew, as in *Railroad Commission* v. *Eastern Texas Railroad,* 264 U. S. 79. This is not the case of the Colorado & Southern undertaking to abandon its charter obligations and to pull up its tracks and dismantle its property in three States.

The power of Congress or its appropriate agencies over practically all functions and activities of interstate carriers, without regard to distinctions between interstate and intrastate commerce, is now well established (see Appendix B).

III

THE NET RAILWAY OPERATING INCOME OF COLORADO & SOUTHERN

Opposing counsel complain of the following finding (R. 9, Br. 43):

> The applicant's net railway operating income for 1921 and 1922 was $1,903,793.39 and $1,061,877.35, respectively. For the first 11 months of 1923 it was $664,723, as shown by its monthly reports filed with us.

They say "These monthly reports were not in evidence and are not in the record," and "it is fair to assume that they had considerable weight with the Commission," and " It may be that they constitute the basis of the order here in question" (Br. 44).

Counsel do not appear to question the accuracy of the figures for the years 1921 and 1922 for, they say, " The finding of the majority as to net railway operating income for the years 1921 and 1922 will not support the order in the absence of a finding as to the value of the property used in intrastate commerce," etc. (Br. 44). With all of the emphasis of italics, they do challenge the finding " For the first 11 months of 1923 it was $664,723 as shown by its monthly reports filed with us" (Br. 43).

For 1922 the Company reported net railway operating income of $1,061,877.35 (R. 231), and for 11 months of 1921 it reported $1,869,401 (or $34,392.39 less than $1,903,793.39, with the month of December missing). The net railway operating

income for December, 1921, does not appear in the record. Dividing $1,903,793.39 by 12, the average per month is $158,649.45. To allow $34,392.39 for December, therefore, is not unreasonable. In any case, as already pointed out, those figures are not challenged.

Even if the figures, $664,723, as shown by the reports filed with the Commission, are not considered, there is still ample, separate and apart therefrom, to sustain the order.

In *United States* v. *Abilene & Southern Railway*, 265 U. S. 274, 287, it was said, "The parts of the annual reports in question were used as evidence of *facts which it was deemed necessary to prove* * * * (italics ours)." Without the finding complained of in the instant case there is ample evidence to support the order, and the finding is not necessary, as the exhibit was in the *Orient Divisions Case, supra.* The absence of the finding complained of obviously would not have made the slightest difference in the result.

IV

CONCLUSION

The judgment of the District Court was right and should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

FEBRUARY, 1926.

APPENDIX A

(*Ante*, p. 17)

Section 400, par. (5), provides that all charges made for any service rendered or to be rendered in the transportation of passengers and property shall be just and reasonable (Ch. 91, 41 Stat. 475).

Section 407, par. (1), provides that under certain terms and conditions the Commission shall have authority by order to approve and authorize, if assented to by all of the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions as shall be found by the Commission to be just and reasonable in the premises (41 Stat. 481).

Section 407, par. (2), provides that under the authority of the Commission, on application of any carrier or carriers, that the acquisition to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition (41 Stat. 481).

Section 407, par. (4), provides that the Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into

a limited number of systems in such a way that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties (41 Stat. 481).

Section 407, par. (6), provides that two or more carriers may consolidate their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties (41 Stat. 481).

Section 407, par. (7), provides that the Commission is authorized to approve the consolidation of four express companies into one company (41 Stat. 482).

Section 416, par. (3), provides that the Commission is authorized to revise any charge or practice which causes any undue or unreasonable advantage to accrue to persons or localities interested in intrastate transportation as against interstate transportation, and State authorities shall be notified when rates made by them are in issue (41 Stat. 484) (*Railroad Commission of Wisconsin* v. *C., B. & Q. R. R.*, 257 U. S. 563).

Section 418, par (1), provides that the Commission is authorized to prescribe reasonable maximum or minimum, or maximum and minimum, rates for individual or joint transportation and to declare what individual or joint classification, regulation, or practice should be observed thereafter, and to establish joint rates and charges, the act setting forth principles to be observed in fixing joint rates (41 Stat. 484).

Section 418, par. (6), provides that the Commission may establish the division of joint rates

among carriers (41 Stat. 486) (*New England Divisions Case,* 261 U. S. 184).

Section 422 provides that the Commission is directed so to adjust rates as to allow to the railroads a fair return upon the aggregate value of their property as the value of that property shall be determined by the Commission; and as that value shall be entitled to consideration for rate-making purpose, 6 per cent shall be temporarily fixed and considered a fair return; the statute further directs that, inasmuch as it is impossible to fix rates which will adequately sustain all the carriers that are indispensable to the communities to which they render service without enabling some carriers to receive a net railway operating income substantially in excess of a fair return upon the value of the property used in the service of transportation, such excess shall be paid to the United States, to be held for two purposes—one half to be used as a reserve fund for such carrier and after a certain point has been reached the remainder to be usable by the carrier for any lawful purpose; the other half to be held by the Commission for a general railroad contingent fund, to be used in making loans to carriers or in purchasing equipment or facilities and leasing the same to carriers (41 Stat. 488–489) (*Dayton-Goose Creek Railway Co.* v. *United States,* 263 U. S. 456).

Section 422, par. (12), provides that a carrier may at any time make application to the Commission for a loan from the general railroad contingent fund (41 Stat. 490).

Section 422, par. (13), provides that a carrier may at any time make application to the Com-

mission for lease to it of transportation equipment or facilities purchased from the general railroad contingent fund (41 Stat. 490).

Section 439, par. (2), provides that carriers may not issue securities, even though permitted by the authority creating the carrier corporation, without the authorization of the Commission, and then only to the extent that, upon application by the carrier and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, the Commission may prescribe (41 Stat. 494).

In *Dayton-Goose Creek Railway Co.* v. *United States*, 263 U. S. 456, 478, this Court, speaking through Mr. Chief Justice Taft, said:

> The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

APPENDIX B

(*Ante*, p. 23)

In all of the following subjects, as is inevitable, the carrier is treated as a unified instrumentality.

Agreements restraining interstate commerce forbidden (*Northern Securities Co.* v. *United States,* 193 U. S. 197).

Air brakes (Ch. 196, 27 Stat. 531; Ch. 87, 29 Stat. 85; Ch. 976, 32 Stat. 943, Ch. 160, 36 Stat. 298; *New York Central Railroad* v. *United States,* 265 U. S. 41).

Ash pans on locomotives (*Ash Pan Act,* Ch. 225, 35 Stat. 476).

Automatic train-stop or train-control devices, Section 26, Transportation Act, 1920 (Ch. 91, 41 Stat. 456, 498, 499; *Delaware & Hudson Co.* v. *United States,* 5 Fed. Rep. (2d) 831).

Bills of lading (*United States* v. *Alaska S. S. Co.,* 253 U. S. 113).

Block signals (*Joint Resolution,* 34 Stat. 838; *Urgent Deficiencies Act,* Oct. 22, 1913, Ch. 32, 38 Stat. 212).

Books of account and records of all business, including intrastate business (*Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194).

Car doors (*Loomis* v. *Lehigh Valley R. Co.,* 240 U. S. 43).

Color blindness, qualification of employees (*Nashville, C. & St. L. Ry. Co.* v. *Alabama,* 128 U. S. 96).

Contracts between employee and employer (*Patterson* v. *Bark Eudora,* 190 U. S. 169; *Robertson* v.

Baldwin, 165 U. S. 275; *McLean* v. *Arkansas*, 211 U. S. 539; *Erie R. Co.* v. *Williams*, 233 U. S. 685).

Distribution of equipment, coal cars (*Interstate Commerce Comn.* v. *Illinois Central R. Co.*, 215 U. S. 452; *Interstate Commerce Comn.* v. *Chicago & Alton R. Co.*, 215 U. S. 479; *United States* v. *New River Co.*, 265 U. S. 533).

Earnings, recapture of excess (*Dayton-Goose Creek Railway*, 263 U. S. 456).

Employers' liability (*Second Employers' Liability Cases*, 223 U. S. 1).

Full crews (*Chicago, R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *St. Louis, I. M. & S. Ry. Co.* v. *Arkansas*, 240 U. S. 518).

Hours of service (*Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Atchison, Topeka & Santa Fe* v. *United States*, No. 273, October Term, 1925).

Illegal boycotts (*Loewe* v. *Lawler*, 208 U. S. 274).

Joint use of terminals for switching (*Pennsylvania Co.* v. *United States*, 236 U. S. 351; *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1; *United States* v. *Pennsylvania Railroad*, 266 U. S. 191).

Live stock shall not be confined in cars for period exceeding 28 hours (*United States* v. *Baltimore & O. S. W. R. Co.*, 222 U. S. 8).

Locomotive boilers (*Boiler Inspection Act*, Ch. 103, 36 Stat. 913).

Locomotive headlights (*Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280).

Pipe lines (*The Pipe Line Cases—Ohio Oil Co.* v. *United States*, 234 U. S. 548).

Pre-cooling and pre-icing of refrigerator cars (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 232 U. S. 199, 221).

Rates, increases in freight and passenger (*United States* v. *Village of Hubbard,* 266 U. S. 474; *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R.,* 257 U. S. 563; *State of New York* v. *United States,* 257 U. S. 591; *Shreveport Case,* 234 U. S. 342; *American Express Co.* v. *Caldwell,* 244 U. S. 617; *United States* v. *State of Tennessee,* 262 U. S. 318).

Running of separate trains instead of mixed freight and passenger trains (*Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262, 269).

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 195

THE STATE OF COLORADO,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE COLORADO & SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE COLORADO & SOUTHERN RAILWAY COMPANY, APPELLEE.

BRUCE SCOTT,
KENNETH F. BURGESS,
J. Q. DIER,
J. H. BARWISE, JR.,
Counsel for The Colorado & Southern Railway Company.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE COLORADO & SOUTHERN RAILWAY COMPANY, APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the District Court of the United States for the District of Colorado denying relief in a suit brought by the State of Colorado against the appellees above named to enjoin and set aside in part a certificate and order of the Interstate Commerce Commission authorizing The Colorado & Southern Railway Company (hereinafter referred to

as "the railway company",) to abandon a branch line of railroad approximately 29 miles in length located in Chaffee County, Colorado. It is sought to have the order set aside only in respect to intrastate commerce on this branch line.

The railway company is a Colorado corporation and operates in interstate commerce various lines in that state and extending into Wyoming and New Mexico. Included in these lines is the narrow-guage branch line in question, known as the Buena Vista-Romley Branch, authority to abandon operation of which it sought in a petition filed with the Interstate Commerce Commission Sept. 1, 1921, pursuant to paragraph 18 of Section 1 of the Interstate Commerce Act (41 Stat. L. 477).

BASIS OF APPLICATION.

The application, after describing the location of the line, in detail, as hereinafter set forth, alleged that the branch had been operated from Buena Vista to Romley for the purpose of affording transportation facilities to and from certain metalliferous mines located in the mountains westerly of Buena Vista; that practically all of such mines were then and had for a long time past been closed, and were not being and for a long time past had not been operated, with the result that said line of railroad extending from Buena Vista to Romley for many years last past had not been able to earn and was not earning its operating expenses; that so far as could be ascertained after diligent inquiry and investigation there was no prospect of a reopening of said mines; that during recent years the deficits sustained from the operation of said line of railroad had been increasingly heavy, amounting, including taxes, during the year 1919 to over $43,000, and during the year 1920 to over $51,000;

that the deficits sustained from the operation of said line of railroad for the first six months of 1921, including taxes, amounted to over $24,000. (Rec., 46.)

PROCEEDINGS BEFORE COMMISSION AND DISTRICT COURT.

The Interstate Commerce Commission made three different reports in the matter. *Abandonment of Branch Line by Colorado & Southern Ry.* 72 I. C. C. 315, (Rec., 15); *Abandonment of Branch Line by Colorado & Southern Ry.* 82 I. C. C. 310 (Rec., 21); *Abandonment of Branch Line by Colorado & Southern Ry.* 86 I. C. C. 393 (Rec., 7). In connection with the last named report the Commission on February 11, 1924, issued an amended certificate of public convenience and necessity (now sought to be set aside in part), wherein it authorized the abandonment of both interstate and intrastate operations of this branch line after six months from date. The Commission found that the continued operation as to intrastate commerce would constitute an undue burden upon interstate commerce and that large deficits from the operation of the branch line are reflected in the accounts of the railway company, which is an interstate carrier, and that "it is required to bear or make good the deficits from such operation." (86 I. C. C. 393; Rec., 9.) In making these findings the Commission expressly differentiated the facts of this case from those considered by this court in *Texas* v. *Eastern Texas Railroad Co.* 258 U. S. 204. The State of Colorado sought by a bill in equity to have the certificate and order set aside in respect to intrastate commerce on this branch line.

The District Court of the United States for the District of Colorado (Circuit Judge Lewis and District Judges Symes and Phillips sitting) on August 19, 1924, entered a decree denying preliminary and permanent

injunctions, dismissing appellant's bill of complaint and denying an application for an order suspending the order of the Interstate Commerce Commission pending appeal. (Rec., 41, 42.)

DESCRIPTION OF BRANCH LINE.

The branch line in question is described by the Commission as follows:

> "The branch line in question extends from Buena Vista in a southerly and westerly direction to Romley and includes certain trackage extending westerly from Romley to the Flora Bell Mine and Hancock, a total distance of 29.42 miles. It has no connection with any of applicant's other operated lines. Its eastern terminus at Buena Vista is approximately 29 miles southwest of Garos, Park County, Colo., through which point applicant's nearest operated line of railroad extends. This branch comprises a segment of a narrow-gauge line of railroad which was constructed during the years, 1874 to 1882 from Denver, across the Continental Divide by means of the Alpine Tunnel, to Gunnison and the Gunnison County coal fields. This railroad was continuously operated until 1910. At that time the line between Garos and Macune, a distance of 28.84 miles, and between Hancock and Quartz, a distance of 13.57 miles, including the Alpine Tunnel, was abandoned, and operation thereover has never been resumed. A large part of the abandoned track has been washed out and destroyed. Operation of that portion of the line from Quartz to its western terminus was taken over by the Denver & Rio Grande Railroad Company and has since been and is now being operated as a part of that company's system, with the exception of that portion thereof which parallels the Denver & Rio Grande Railroad between Parlin and Gunnison, a distance of 11.64 miles, which portion has also been abandoned and parts thereof destroyed. The applicant acquired ownership of the line in 1898. It has continued to operate the branch in question from Buena Vista to Romley for the purpose of furnish-

ing transportation facilities for certain communities, mining camps, and mines located in the mountains west of Buena Vista and east of the Continental Divide. The track is laid with 40-pound to 56-pound rail and the maximum grade is 4 per cent. The present service consists of a mixed train which makes the round trip three days a week. The equipment consists of one locomotive, one combination baggage car and passenger coach, and a few box, coal, and flat cars." (72 I. C. C. 315, at 316, 317.) (Rec., 16.)

This branch connects at Buena Vista and interchanges traffic with the main line of the Denver & Rio Grande Railroad (now known as the Denver & Rio Grande Western) an interstate carrier. (Rec., 73, 84, 86, 90, 92.) The Denver & Rio Grande has a three-rail line between Buena Vista and Leadville (Rec., 90) permitting interchange of business at Buena Vista without transfer from narrow gauge to broad gauge equipment. (Rec., 92.) At Leadville the Denver & Rio Grande connects and interchanges business with the narrow gauge line of the Colorado & Southern from Leadville to Denver. (Rec., 60; Map, Rec., 97.) At Pueblo the Denver & Rio Grande connects and interchanges business with the broad gauge main line of the Colorado & Southern. (Rec., 84, 86.)

NATURE OF TERRITORY SERVED.

The territory served by the branch line is described by the Commission as follows:

"The territory traversed by the branch is described as extremely rugged and mountainous. The principal industry is mining, but there has been a small agricultural and lumbering development. The only town of importance served by the branch is Buena Vista, with a population of 903. This town is also served by the Denver & Rio Grande Railroad. There are several small communities along the line which are not served by any other railroad. The distances from these points to another railroad

> range from 5.4 miles to 21.29 miles. The population of the territory tributary, including the population of Buena Vista is estimated by the applicant at 993." (72 I. C. C. 315, at 317.) (Rec., 17.)

The elevation of Buena Vista is 7,955 feet above sea level. Almost due west from Buena Vista the three college peaks, Princeton, Harvard and Yale, tower to heights in excess of 14,000 feet. The railroad in question skirts the base of Mt. Princeton and near the station called Mt. Princeton enters the narrow and precipitous canyon or gorge along which its roadbed of sharp curves and severe grades climbs and winds toward the Continental Divide. (Rec. 94, 89, Map, Exhibit 14, Rec. 160; Map Exhibit 15, Rec 160.) The road ascends 3,062 feet between Buena Vista and Hancock, while between Nathrop and Hancock, or a distance of 21.4 miles, it ascends 3,322 feet, Nathrop being 260 feet lower than Buena Vista.

There are grades at every point on the line, the grade from Mt. Princeton being continuously very heavy. The maximum grade is 4 per cent. (Rec., 88.) 37 per cent of the line is curved, the maximum curvature being 29 degrees. (Rec., 89.)

One engine and crew can safely handle only 15 loads down the mountain from Romley and going up the mountain they can handle only 110 tons. (Rec., 94.)

This line from Buena Vista to Romley is subject to both wash-ins and wash-outs. These wash-ins occur three or four times in a summer at as many as five places. Heavy cloudbursts in the mountains and heavy rains wash gravel off of Chalk Mountain and the heavy rains take it down to the track and sometimes take the track out and at other places fill it up on top anywhere from 30 to 50 feet in length and 5 to 6 feet in height. This

material washed in is extremely hard stuff to handle. When it is wet it sticks to a shovel and is hard to remove, and when it gets dry it becomes hard and solid like cement. (Rec., 96.)

The only station agent on the entire line is located at Buena Vista. (Rec., 90.) The only stations where there are people living are at Mt. Princeton, with a population of 12 and an altitude of 8,181 feet; Fisher, with a population of 6 and an altitude of 9,259 feet; St. Elmo, with a population of 37 and an altitude of 10,053 feet; Romley, with a population of 25 and an altitude of 10,535 feet; and Hancock, with a population of 10 and an altitude of 11,017 feet. (Rec., 73, 94.)

It appears that the population of these communities was generally less in 1920 than it was 20 years ago, this being true even at Buena Vista. (Rec., 73, 93.) While the total population along the line was only 993, including Buena Vista with 903, yet only 90 people were really dependent on the line for railroad facilities, since Buena Vista is served by the Denver & Rio Grande main line from Denver to Salt Lake.

THE COMMISSION'S FINAL REPORT.

In its third and final report in the proceedings before it, the Interstate Commerce Commission, after reviewing the evidence showing operating deficits and other material facts, found:

> "The protestants contend that paragraphs (18) to (21), inclusive, of section 1 of the act, in so far as they may attempt to confer exclusive jurisdiction upon us to permit the abandonment of lines of railroad located and doing business wholly within the state of Colorado and engaged in its intrastate commerce, are unconstitutional. The case of *Texas* v. *Eastern Texas R. R. Co.* 258 U. S. 204, is relied upon to support such contention. In our opinion the

conclusion therein reached does not apply to the facts in the present case. The applicant's lines are not located and doing business wholly within the State of Colorado. The applicant is an interstate carrier, the operating results of the branch line are reflected in its accounts, and it is required to bear or make good the deficits from such operation. It clearly appears that, in the language of the Supreme Court in the case above cited, the large losses sustained in operating the branch line 'would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.' We are of opinion that we have jurisdiction." (86 I. C. C. 393, at 395.) (Rec., 9.)

OPERATING RESULTS.

This report shows that the Commission found that from January 1st, 1916, to May 31st, 1923, the operating results of the branch line were: Operating revenues, $88,588.04; operating expenses, $236,185.04; taxes, $157,244.35. Eliminating the item of taxes, the deficit in the net operating revenues was $147,597. It found that practically all of the operating expenses excepting superintendence are direct charges to the branch line. It found that the gross operating revenues on this branch had declined from $25,507.68 in 1916 to $5,813.91 in 1922, and $1,788.18 for the first five months of 1923. It found that the number of passengers carried on this branch line decreased from 3,711 in 1916 to 725 in 1922 and 185 in the first five months of 1923. It made a definite finding that the record does not contain any assurance that future operations would show a more favorable result. (Rec., 8.)

The foregoing figures show that for the first five months of 1923 the monthly average of passengers traveling on this branch line was only 37 persons, or a total of 185. With the operation of tri-weekly service in both

directions, and a consequent running of a total of 126 trains for the five months, the average number of passengers on each train during this period was only 1.46 persons. (Rec., 219-220.)

During the first five months of 1923 it was shown (Rec., 219-220) trains operated entirely without passengers as follows:

Month	No. of trains operated without any passengers.
January	5
February	8
March	11
April	8
May	10
Total trains operated without any passengers	42
Total trains operated	126

Passenger revenue for the first five months of 1923 was $175.23, indicating a declining tendency of passenger revenue, which was $828.75 in 1922, and $4,007 in 1916, with a steady decline each successive year except 1919 when the passenger revenue of $1,852.96 was $48.34 in excess of that of the preceding year. (Rec., 210.)

Freight revenue likewise declined. This revenue was shown for the first five months of 1923 as having been $845.52, while for 1922 it was $3,732.64, and in 1916 $20,-167.36, with a steady decline each successive year. Indeed, the mail revenue for these first five months in 1923 nearly equalled the freight revenue, being $685.15, against $845.52 for freight. (Rec., 210.)

The total tonnage during the same five months is shown to have declined to 357 tons. This included 20 cars of carload freight consisting of 3 cars of hay, 15 cars of ore, 1 car of ice, 1 car of logs and 66 tons of less-than-

carload merchandise, or an average of only 1,047 pounds of merchandise freight for each of the 126 trains operated. (Sheet 4, opposite Rec. 214.)

Thus the average train during this entire period of the first five months of 1923 had only 1.46 passengers and barely a half ton of less-than-carload merchandise freight. Every sixth train carried in addition one car of low-grade freight. To accomplish this transportation and that of the mail and to earn $82.28 of other revenue, the railway company incurred a railway operating deficit on the branch line of $25,629.62 including taxes, or an operating deficit of $13,613.61, excluding taxes. (Rec., 209, 210.)

Exhibit 1-A of the applicant introduced in evidence at the July 13, 1923, hearing (Rec., 209, 67), showed the following results of operation on the branch line in question:

	Operating Revenues:	Operating Expenses:	Operating Deficit:	Taxes:	Net Railway Operating Deficit:
1916.....	$25,507.68	$25,520.55	12.87	$14,230.59	$14,243.46
1917.....	17,830.53	25,185.04	7,354.41	17,903.30	25,257.81
1918.....	13,890.21	33,602.75	19,712.54	16,250.87	35,963.41
1919.....	9,983.38	33,846.32	23,862.94	20,017.97	43,880.91
1920.....	7,231.79	36,227.35	28,995.56	22,730.41	51,725.97
1921.....	6,542.36	35,746.96	29,204.60	25,256.78	54,461.38
1922.....	5,813.91	30,654.28	24,840.37	28,838.42	53,678.79
To June 1, 1923.....	1,788.18	15,401.79	13,613.61	12,016.01	25,629.62
Total	$88,588.04	$236,185.04	$147,597.00	$157,244.35	$304,841.35

The figures for 1923 are for the first five months and were the latest figures available at the time of the second hearing before the Commission. These figures show that the revenues of this branch line for the years 1916 to 1922 have averaged $12,399.98 while its operating expenses have averaged $31,540.46. There has been an average operating deficit of $19,140.48, the deficits being much greater in the later years than the average.

TAXES EXCEED GROSS REVENUES.

Taxes have averaged $20,746.90 and the net railway operating deficit has averaged $39,887.39. It is to be noted that since 1917 the taxes alone have greatly exceeded the gross revenues and that during this seven year and five months period this excess of taxes over gross revenues has amounted to $68,656.31. It is true that the Commission said that "the record does not show how much the applicant's taxes would be reduced through the proposed abandonment" (Rec., 8, 33) because although the figures shown were the actual taxes paid on this branch, the method in Colorado of assessing taxes is to ascertain the value of the whole system and distribute the taxes over the system to the various counties in proportion to the main track miles in the county "operated and non-operated." While no figures were available as to the actual tax valuation placed on this branch, in the distribution of the gross value of all of the railway's property there was allocated to this branch a valuation of $31,414 a mile. The valuation allocated to the branch line not being necessarily its actual value, if the actual value were proportionately less than the valuation of the main line, the taxes allocated to Chaffee County in which the branch lies would be on a basis in excess of the value of the branch line, but would tend to reduce taxes paid on applicant's other lines. This situation led the Commission to say:

> "This testimony leaves in doubt the question as to how much, if at all, applicant's tax payments would be reduced by the abandonment of this branch. However, when a part of a railway system like this branch fails to earn operating expenses, the taxing authorities in the public interest may well give consideration to the possibility of affording relief to the extent of their authority." (Rec., 33.)

WAGE COSTS EXCEED GROSS REVENUES.

Further comparisons between gross revenues and expenses may be helpful in showing that the Commission acted upon substantial evidence in certifying that the present and future public convenience and necessity permitted the abandonment of this branch from and after six months from the date of the certificate. (Rec., 11, 12.) In 1922 the gross freight revenue was $3,732.64 and the total revenue was $5,813.91 (Rec., 210) while enginemen's wages were $5,127.34, fuel for locomotives cost $2,638.47 and trainmen's wages were $4,389.02. In 1919 the gross revenues were barely sufficient to pay the wages of the enginemen and trainmen while in 1920 (Rec., 68-69), 1921 and 1922 (Rec., 210, 211) the wages of the enginemen and trainmen exceeded the gross revenues. In 1918 the gross revenues were slightly in excess of the expenses incurred in the maintenance of the roadbed (Rec. 68-69) while in 1919, 1920 (Rec., 68-69), 1921 and 1922 (Rec., 210, 211) the cost of maintaining the roadbed alone far exceeded the gross revenue. In 1920, 1921 and 1922 the actual "transportation expenses" incurred in operating this branch such as station service, train service including enginemen's wages, fuel, trainmen's wages and other train and transportation expenses, were more than twice the gross revenues. (Rec., 68, 69, 210 211.) A comparison of the total freight revenue for 1921 (Rec., 210) with the employees' wage figures for 1921 (Rec. 159) shows that the railway company paid out to its sectionmen nearly $2,000 more than it took in in freight revenues, while such freight revenue was not even sufficient to pay the enginemen's wages, and was only slightly in excess of the trainmen's wages.

These figures are illustrative of many similar figures in the record and speak for themselves as to the necessity for a railroad in the section reached by this narrow gauge line. They represent obviously a large economic loss to this railway company and a consequent burden upon interstate commerce. It is not surprising in view of this showing that both the majority and minority opinions of the Commission agreed that this branch line ought not longer to be operated. Thus, Commissioner Eastman in his dissent in which Commissioners Campbell and Cox concurred, said:

> "I agree that the conditions surrounding the line in question are such that public convenience and necessity do not require its continued operation." (Rec., 9.)

And again:

> "I believe that public convenience and necessity do not require the operation of the line in question." (Rec., 11.)

The basis of the dissent merely was that the losses shown did not constitute a sufficient burden upon interstate commerce to warrant the Commission in authorizing abandonment as to intrastate commerce, which was contrary to the finding of the majority.

Chronology of Proceedings Before Interstate Commerce Commission.

The proceeding before the Interstate Commerce Commission was under consideration by that body for 29 months before the final order authorizing abandonment was entered. Repeated hearings and arguments were had and that the case was fully considered by the Commission is shown by the following chronology of events:

September 1, 1921.	Application filed with Interstate Commerce Commission by Colorado & Southern Railway Company to abandon branch line in question. (Rec., 46.)
February 3-4, 1922.	Hearing before Examiner of Interstate Commerce Commission at Denver, Colorado. (Rec., 45-163.)
June 15, 1922.	Argument before Division 4, Interstate Commerce Commission, Washington, D. C.
July 28, 1922.	Report of Division 4, Interstate Commerce Commission, 72 I. C. C. 315, issued denying application with the statement, "If the improvement in operating results, confidently anticipated by protestants, should not materialize within a reasonable period of time, the applicant may renew its application." (Rec., 16-20.)
May 19, 1923.	Petition filed by Colorado & Southern Railway Company to reopen the proceeding. (Rec., 163.)
June 14, 1923.	Order of Interstate Commerce Commission reopening proceeding and assigning same for further hearing. (Rec., 167.)
July 13-14, 1923.	Further hearing before Examiner of Interstate Commerce Commission at Denver, Colorado. (Rec., 167-233.)
September 24, 1923.	Report and order of Division 4, Interstate Commerce Commission, 82 I. C. C. 310, issued finding continued decline in traffic, that continued operation would burden interstate commerce, and authorizing abandonment of branch line together with issuance of a certificate therefor. (Rec., 21-23.)

November 12, 1923.	Order of Interstate Commerce Commission reopening proceeding for further argument before entire Commission on petition of State of Colorado and other protestants. (Rec., 243.)
December 1, 1923.	Reargument before Interstate Commerce Commission, Washington, D. C.
February 11, 1924.	Report and order of Interstate Commerce Commission on reargument affirming findings of Division 4 issued, 86 I. C. C. 393. This included an amended certificate of convenience and necessity authorizing abandonment of the branch line six months thereafter. (Rec., 244-249.)
August 7, 1924.	Order Interstate Commerce Commission amending certificate of convenience and necessity so as to make same effective from and after September 11, 1924.
August 19, 1924.	District Court of the United States for the District of Colorado (Lewis, Circuit Judge, and Symes and Phillips, District Judges), sitting at Denver, Colorado, dismissed bill of complaint of appellant herein alleging invalidity of order of Interstate Commerce Commission and denied application for injunction pending appeal. (Rec., 41, 42.)
September 11, 1924.	Order Interstate Commerce Commission further amending certificate of convenience and necessity so as to make same effective from and after October 11, 1924.
October 11, 1924.	Tariffs withdrawing freight rates and passenger fares on branch line become effective.

SUMMARY OF ARGUMENT.

Appellee railway company contends that the certificate and order of the Interstate Commerce Commission authorizing this abandonment were clearly within its statutory authority;[1] that this statutory authority to the Commission authorizing abandonment was part of a comprehensive scheme of railroad regulation wherein Congress sought to provide an adequate system of interstate transportation;[2] that the constitutionality of the Transportation Act, 1920, has been repeatedly upheld by this court;[3] that the courts will not review determinations of the Interstate Commerce Commission made within the scope of its power or substitute their judgment for its findings;[4] that the final order of the Interstate Commerce Commission was entered after full hear-

[1] Interstate Commerce Act, section 1, paragraphs 18 to 20 (41 Stat. at L., 477).

[2] Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563, at 585.
New England Divisions Case, 261 U. S. 184 at 189.
Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456 at 478.
Railroad Commission of Calif. v. Southern Pacific, 264 U. S. 331, at 347.
D. & M. Ry. Co. v. Boyne City G. & A. R. Co., (District Court, Eastern District of Michigan, Tuttle, J.) 286 Fed. 540, at 547-548.

[3] Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563.
New York v. United States, 257 U. S. 591.
State of Texas v. Eastern Texas R. Co., 258 U. S. 204.
State of Texas v. I. C. C., 258 U. S. 158, at 165.
Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456.
Railroad Com. of Calif. v. Southern Pacific Company, 264 U. S. 331.
Kansas City, Mexico & Orient Division Case, (U. S. v. Abilene & S. Ry. Co.) 265 U. S. 274, at 285.

[4] United States v. New River Company, 265 U. S. 533 at 542.
Illinois Central v. Interstate Commerce Commission, 215 U. S. 452 at 470.
Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541 at 547.
Kansas City Southern Railway Company v. U. S., 231 U. S. 423 at 456.
U. S. v. Louisville & Nashville Ry. Co., 235 U. S. 314 at 320.
Manufacturers Railway Company v. U. S., 246 U. S. 457 at 488.
Seaboard Air Line Railway Co. v. U. S., 254 U. S. 57 at 62.
New England Divisions Case, 261 U. S. 184, 203-204.

ing and argument, rehearing and reargument, upon consideration of the evidence of record;[5] that the Commission made an administrative finding of the existence of an undue burden upon interstate commerce through the operation of this branch, which finding was based upon substantial evidence;[6] that similar burdens have been frequently enjoined by the courts both prior and subsequent to the Transportation Act of 1920 as undue interference with interstate commerce.[7]

In answer to the contention of appellant that this case is ruled by the *Eastern Texas Case*, 258 U. S. 204, we reply that the Commission and the lower court correctly held that the facts in this case differentiate it from the Eastern Texas Case, appellee being an artery of interstate commerce in several states, the utility of which would be burdened by operation of this branch line.[8]

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[5] Abandonment of Branch Line by The Colorado and Southern Railway Co., 72 I. C. C. 315. Decided July 28, 1922, by Division 4 Interstate Commerce Commission. (Rec., 15.)

Abandonment of Branch Line by The Colorado and Southern Railway Co., 82 I. C. C. 310. Decided Sept. 24, 1923, by Division 4 on further hearing. (Rec., 21.)

Abandonment of Branch Line by The Colorado and Southern Railway Co., 86 I. C. C. 393. Decided February 11, 1924 by Commission on further argument. (Rec., 7.)

[6] Abandonment of Branch Line by The Colorado and Southern Railway Co., 86 I. C. C. 393 at 395. (Rec., 7-9.)

[7] C. B. & Q. R. R. Co. v. Railroad Comm. of Wis., 237 U. S. 220.

Mississippi Railroad Commission v. Illinois Central R. R. Co., 203 U. S. 335.

Atlantic Coast Line v. Wharton, 207 U. S. 328.

Herndon v. C. R. I. & P. Ry. Co., 218 U. S. 135.

Roach v. A. T. & S. F. Ry Co., 218 U. S. 159.

Railroad Commission of California v. Southern Pacific Company, 264 U. S. 331.

Davis, Director General v. Farmers Cooperative Company, 262 U. S. 312.

A. T. & S. F. Ry. Co. v. Wells, 265 U. S. 101.

[8] Abandonment of Branch Line by The Colorado and Southern Railway Co., 72 I. C. C. 315. Decided July 28, 1922, by Division 4, Interstate Commerce Commission.

Abandonment of Branch Line by The Colorado and Southern Railway Co., 82 I. C. C. 310. Decided Sept. 24, 1923, by Division 4 on further hearing.

Abandonment of Branch Line by The Colorado and Southern Railway Co., 86 I. C. C. 393. Decided February 11, 1924 by Commission on further argument.

The other points relied upon by appellant have already been ruled upon by this court adversely to appellant's contention; (a) contract or charter obligation of a carrier yields to the power of Congress to regulate interstate commerce and to administrative orders of the Interstate Commerce Commission entered thereunder;[9] (b) no duty rested on the Interstate Commerce Commission under the law to separate property values and revenue and expenses as between intrastate and interstate operations.[10]

We therefore contend that the decree of the lower court dismissing the bill should be affirmed.

[9] Louis. & Nash. Railroad Co. v. Mottley, 219 U. S. 467 at 482.
New York v. United States, 257 U. S. 591 at 600-601.
Philadelphia, B & W. R. Co. v. Schubert, 224 U. S. 603, 613.

[10] Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563 at 587.
Dayton-Goose Creek Railway Co. v. United States, 263 U. S. 456 at 485.

ARGUMENT.

I.

CERTIFICATE AND ORDER OF INTERSTATE COMMERCE COMMISSION WERE CLEARLY WITHIN ITS STATUTORY AUTHORITY.

For ready reference the provisions of the Interstate Commerce Act which prohibit any carrier subject to the Act, from abandoning "all or any portion of a line of railroad or the operation thereof" unless the Commission first issues a certificate that the present or future public convenience and necessity permit of such abandonment, are set forth in the appendix to this brief. These paragraphs provide among other things that

> "no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." (Par. 18.) * * *
>
> "From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the * * * abandonment covered thereby". (Par. 20.)

The Amended Certificate of Public Convenience and Necessity issued February 11, 1924, omitting the caption and signature, reads as follows:

> "A further argument and investigation of the matters and things involved in this proceeding having been had, and the commission having, on the date hereof, made and filed a report containing its

findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Colorado & Southern Railway Company of the branch line of railroad in Chaffee County, Colo., described in the application and report aforesaid.

It is ordered, That the Colorado & Southern Railway Company when filing schedules canceling tariffs applicable on said branch line, shall in such schedules make specific reference to this certificate by title, date, and docket number.

It is further ordered, That this certificate shall take effect and be in force from and after six months from the date of its issue, and shall replace the certificate of public convenience and necessity issued September 24, 1923, in this proceeding." (Rec., 11-12.)

The statute authorizing abandonment expressly applies to "carriers by railroad subject to this Act" which are defined in Section 1 of the act to be "common carriers engaged in the transportation of passengers or property wholly by railroad * * * in interstate or foreign commerce."

There is and can be no contention that The Colorado and Southern Railway Company is not a common carrier subject to the Interstate Commerce Act. Indeed, the appellant does not question the validity of the Commission's certificate and order as to the abandonment of interstate and foreign commerce on the branch line involved in this application. The branch was clearly "all or" a "portion of a line of railroad."

Paragraph 3 of Section 1 of the Interstate Commerce Act provides:

> "The term "railroad' as used in this Act shall include * * * all the road in use by any common carrier operating a railroad, whether owned or

> operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

That this branch line was a railroad within this designation cannot be questioned. The Commission so held in each of its three reports. It is noteworthy that Commissioner Eastman, who dissented from the final report on the ground that the losses shown in operation did not constitute a sufficient burden upon interstate commerce to warrant the Commission in extending its authority of abandonment to intrastate operations, joined in the first report made by the Commission through Division 4, in which it said:

> "Prior to the hearing the State of Colorado, by its public utilities Commission, filed a motion to dismiss the proceeding on the ground that the applicant's railroad is located wholly within the State of Colorado and therefore we have no jurisdiction to authorize its abandonment, and a hearing was held thereon. This motion was renewed at the main hearing, and like motions were made on the behalf of certain of the intervening protestants. While the branch line lies entirely within the State of Colorado it constitutes a part of applicant's system, its operating results are reflected in the accounts of the applicant, and the latter would be required to bear or make good any deficits from its operation. We are therefore of opinion that we have jurisdiction." *Abandonment of Branch Line by The Colorado and Southern Railway Co.* 72 I. C. C. 315. (Rec., 16.)

This finding was repeated in the second report, *Abandonment of Branch Line by The Colorado and Southern Railway Co.* 82 I. C. C. 310 (Rec., 22), and in the third report, *Abandonment of Branch Line by The Colorado & Southern Railway Co.* 86 I. C. C. 393. (Rec., 9.)

II.

STATUTORY AUTHORITY TO COMMISSION TO AUTHORIZE ABANDONMENT WAS PART OF A COMPREHENSIVE SCHEME OF RAILROAD REGULATION WHEREIN CONGRESS SOUGHT TO PROVIDE AN ADEQUATE SYSTEM OF INTERSTATE TRANSPORTATION.

Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.* 257 U. S. 563, at 585.

New England Divisions Case, 261 U. S. 184, at 189.

Dayton-Goose Creek Ry. Co. v. *U. S.* 263 U. S. 456, at 478.

Railroad Commission of Calif. v. *Southern Pacific,* 264 U. S. 331.

D. & M. Ry. Co. v. *Boyne City G. & A. R. Co.* (District Court, Eastern District of Michigan, Tuttle, J.), 286 Fed. 540, at 547-548.

In *Dayton-Goose Creek Ry. Co.* v. *U. S.* 263 U. S. 456, 478, in which the "recapture" provisions of the Act were involved, the court said:

> "* * * the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the

> Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, *their abandonment of old lines,* and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged." (Italics ours.)

See also *The New England Division Case,* 261 U. S. 184, note on page 190, wherein the power to "authorize abandonment of unprofitable and unnecessary lines" was referred to as prominent among the new provisions by which "the 1920 act sought to ensure * * * adequate transportation service".

In *Railroad Commission of California* v. *Southern Pacific Company* (The Los Angeles Union Depot Case), 264 U. S. 331, the court in discussing the authority conferred on the Commission by paragraphs 18 to 21 of Section 1 and other sections of the Interstate Commerce Act, spoke of "the purpose of Congress to prevent interstate carriers from incurring expenses which will lessen their ability to perform well their interstate functions". (p. 347.)

In *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co.* 257 U. S. 563, which involved the power of the Interstate Commerce Commission to remove discrimination against interstate commerce by action of the state in establishing a lower level of intrastate fares, the court said:

> "Congress, in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traf-

> fic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress, as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. (Citing cases.) In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field." (pp. 589, 590.)

In *Texas* v. *Eastern Texas R. R. Co.* 258 U. S. 204, at 217, the power of the Interstate Commerce Commission to authorize abandonment by an interstate carrier of "a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce" was recognized.

To permit a state to require an interstate carrier to operate in intrastate commerce at a heavy loss a branch line not required by public convenience and necessity would establish a principle which would enable the state to nullify the efforts of Congress to provide an adequate national system of transportation since one of the obvious ways of accomplishing that end is to prevent needless waste by interstate carriers in all their operations. The state cannot be permitted thus to hamper and burden an artery of interstate commerce.

III.

THE CONSTITUTIONALITY OF THE TRANSPORTATION ACT, 1920, HAS BEEN UPHELD.

It is, of course, unnecessary to do more than cite some of the recent cases upholding the constitutionality of the Transportation Act. They are as follows:

Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.* 257 U. S. 563.

New York v. *United States*, 257 U. S. 591.

State of Texas v. *Eastern Texas R. Co.* 258 U. S. 204.

Dayton-Goose Creek Ry. Co. v. *U. S.* 263 U. S. 456.

Railroad Com. of Calif. v. *Southern Pacific Company*, 264 U. S. 331.

U. S. v. *Abilene & S. Ry. Co.* 265 U. S. 274, at page 284.

IV.

COURTS WILL NOT REVIEW DETERMINATIONS OF THE INTERSTATE COMMERCE COMMISSION MADE WITHIN THE SCOPE OF ITS POWERS OR SUBSTITUTE THEIR JUDGMENT FOR ITS FINDINGS AND CONCLUSIONS.

This familiar rule is illustrated by many cases involving not only reasonableness and discriminatory nature of rates, but the various other administrative activities of the Commission. Some of these cases are:

U. S. v. *New River Co.* 265 U. S. 533, at 542, which was a suit to set aside an order of the Interstate Commerce Commission prescribing rules of car distribution.

I. C. C. v. *Illinois Central R. Co.* 215 U. S. 452, at page 470. (Suit to set aside order of Interstate Commerce Commission with respect to car distribution.)

Interstate Commerce Commission v. *Union Pacific Railroad Co.* 222 U. S. 541, at 547. (Suit to set aside order of Interstate Commerce Commission prescribing reasonable freight rates.)

Kansas City Southern Railway Company v. *U. S.* 231 U. S. 423, at 456. (Suit to set aside order of Interstate Commerce Commission prescribing accounting rules for carriers subject to its jurisdiction.)

United States v. *Louisville & Nashville Railway Company,* 235 U. S. 314, at 320. (Suit to set aside order of Interstate Commerce Commission with respect to rebilling of grain at Nashville, Tenn.)

Seaboard Air Line Railway Co. v. *U. S.* 254 U. S. 57, at 62. (Suit to set aside order of Interstate Commerce Commission in respect to switching charges at Richmond, Va.)

New England Divisions Case, 261 U. S. 184, 203-204. (Suit to enjoin order of Interstate Commerce Commission prescribing divisions of rates.) Here it was said, at page 204:

> "To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province."

Manufacturers Railway Company v. *U. S.* 246 U. S. 457, at 488. (Suit to enjoin order of Interstate Commerce Commission prescribing rates and absorption at St. Louis, Mo.) In this case it was held:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the

Commission, (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.* 168 U. S. 144, 170) and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. (p. 481.) * * * The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed, the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done." (p. 482.)

In the light of these decisions it is remarkable that counsel for appellant should argue in this court (Appellant's brief, p. 48) that the findings of fact by the minority of the Commission were right and should be substituted for the finding of the majority that "the large losses sustained in operating the branch line 'would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce,'" and "that the present and future public convenience and necessity permit the abandonment by the applicant of the branch line of railroad in question." (Rec., 9.) Not only is the court bound by the findings of fact by the Commission, but, of course, it looks for such findings to the majority and not to the minority opinion.

V.

FINAL ORDER OF THE INTERSTATE COMMERCE COMMISSION IN THIS CASE WAS ENTERED AFTER FULL HEARING AND ARGUMENT, REHEARING AND REARGUMENT, UPON CONSIDERATION OF THE EVIDENCE OF RECORD.

Abandonment of Branch Line by The Colorado and Southern Railway Co. 72 I. C. C. 315. Decided July 28, 1922, by Division 4 Interstate Commerce Commission. (Rec., 15.)

Abandonment of Branch Line by The Colorado and Southern Railway Co. 82 I. C. C. 310. Decided September 24, 1923, by Division 4 on further hearing. (Rec., 21.)

Abandonment of Branch Line by The Colorado and Southern Railway Co. 86 I. C. C. 393. Decided February 11, 1924, by Commission on further argument. (Rec., 7.)

Exhaustive consideration was given by the Commission to this matter extending over a period of 29 months as shown by the chronology of proceedings before the Commission set forth in the statement of the case. (*Ante*, page 13.) A review of that chronology and of the three reports made by the Commission will demonstrate the unusually exhaustive nature of the consideration which the Commission gave to these abandonment proceedings.

VI.

INTERSTATE COMMERCE COMMISSION HAS MADE ADMINISTRATIVE FINDING OF FACT OF EXISTENCE OF UNDUE BURDEN UPON INTERSTATE COMMERCE.

In its third and final report, among other things, the Commission said:

> "The protestants contend that paragraphs (18) to (21), inclusive, of Section 1 of the act, in so far as they may attempt to confer exclusive jurisdiction upon us to permit the abandonment of lines of railroad located and doing business wholly within the State of Colorado and engaged in its intrastate commerce, are unconstitutional. The case of *Texas* v. *Eastern Texas R. R. Co.* 258 U. S. 204, is relied upon to support such contention. In our opinion the conclusion therein reached does not apply to the facts in the present case. The applicant's lines are not located and doing business wholly within the State of Colorado. The applicant is an interstate carrier, the operating results of the branch line are reflected in its accounts, and it is required to bear or make good the deficits from such operation. It clearly appears that, in the language of the Supreme Court in the case above cited, the large losses sustained in operating the branch line 'would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.' We are of opinion that we have jurisdiction." 86 I. C. C. 393, at 395.

Among the numerous matters of record given consideration by the Commission in entering its order, as shown by its report, were the following:

> "From January 1, 1916, to May 31, 1923, the operating results of the branch line were: Operating revenues, $88,588.04; operating expenses, $236,185.04; taxes, $157,244.35. The record does not show how much the applicant's taxes would be reduced

through the proposed abandonment. Eliminating the item of taxes, the deficit in the net operating revenues was $147,597. Practically all of the operating expenses, excepting superintendence, are direct charges to the branch line. The operating revenues decreased from $25,507.68 in 1916 to $5,813.91 in 1922, and $1,788.18 for the first five months of 1923. The number of passengers carried decreased from 3,711 in 1916 to 725 in 1922, and 185 in the first five months of 1923. The record does not contain any assurance that future operations would show a more favorable result.

The applicant's net railway operating income for 1921 and 1922 was $1,903,793.39 and $1,061,877.35, respectively." 86 I. C. C. 393, at 394-395.

These findings were not arbitrary but were based upon an abundance of evidence in the record.

Appellant in its brief contends that past operating results on the line in question are not sufficient to support the order of the Commission. It is argued that the record does not disclose what it will cost to operate the line in intrastate commerce or what the demands of the State of Colorado will be with reference to specific service.

Obviously the future operations would best be judged by the past. The past operations were shown to have been continuously and progressively carried on at a loss from 1916 and the Commission has specifically found "the record does not contain any assurance that future operations would show a more favorable result". (Rec., 8.)

It is to be borne in mind that the Commission in its first order made July 28, 1922, denied the applicant carrier a certificate of convenience and necessity authorizing abandonment of this branch, but said:

"While the operation of the line for the past four or five years has resulted in substantial losses, the

record affords some assurance that the conditions which produced that result are changing and that future operations may show a more favorable return. * * *

If the improvement in operating results, confidently anticipated by protestants, should not materialize within a reasonable length of time, the applicant may renew its application. It is not in the public interest that even a strong line like the applicant should permanently operate parts of its system that do not yield revenues sufficient to pay operating expenses and interest on the net scrap value of the property. Persons directly interested in the continued operation of the line should co-operate to the fullest extent possible with the management of the road with the view of effecting more favorable operating results. The offer of the applicant to lease the line proposed to be abandoned to protestants for a rental of $5 per year should be given serious consideration by protestants." (Rec., 19, 20.)

May 19, 1923, applicant petitioned for the reopening and further hearing of the case, which petition was granted and a further hearing was held on July 13, 1923, and the matter was again briefed and argued before Division 4 of the Commission on September 4, 1923. On September 24, 1923, the Commission made its further report (Rec., 21), wherein it held:

"The record made at the further hearing clearly establishes that the improvement in operating results anticipated by the protestants at the first hearing has not materialized, and that the operation of the line since the original application was filed has resulted in a large deficit. For the year 1922 operating revenues were $5,813.91; operating expenses $30,654.28; and taxes, $28,838.42. For the first five months of 1923 operating revenues were $1,788.18; operating expenses, $15,401.79; and taxes, $12,016.01. The total tonnage transported in 1922 was 1,865 tons, and in the first five months of 1923, 357 tons. * * *

It is further contended by the protestants that the

proposed abandonment is not within the applicant's charter powers; and that paragraphs 18 to 21, inclusive, of section 1 of the Transportation Act are unconstitutional in so far as they may attempt to confer exclusive jurisdiction upon this Commission to permit the abandonment of lines of railroad located and doing business wholly within the State of Colorado.

The case of *Texas* v. *Eastern Texas R. R. Co.* 258 U. S. 204, is cited in support of the last proposition. In our opinion the conclusion therein reached does not apply to the facts in the present case. The applicant is an interstate carrier, the operating results of the branch line are reflected in its accounts, and it is required to bear or make good the deficits from such operation.

The case for the protestants rests largely upon optimistic predictions and hopes. The record shows that for many years the operation of this branch line has caused the applicant a large annual loss. No definite evidence is submitted upon which a conclusion could be based as to when, if ever, sufficient traffic could be developed to pay the costs of operation. At the further hearing the applicant renewed its offer to lease the line to the protestants at a rental of $5 a year, provided they would operate it in its present condition, or to sell it to them for its scrap value." (Rec., 22.)

A certificate authorizing the abandonment was thereupon issued dated September 24, 1923. (Rec., 23.) Thereafter the State of Colorado and other protestants filed petitions for a rehearing and the case was set for further argument before the full Commission on December 1, 1923. The final report was issued February 11, 1924 (Rec., 7), wherein the Commission again reviewed the evidence, affirmed the findings in its former report, found that in the interval between the two hearings traffic and revenues had shown a progressive decrease, that eliminating the item of taxes, a deficit in net operating revenues from January 1, 1916, to May 1, 1923,

was $147,597, and that during that period taxes on this branch line amounting to $157,244.35 had been paid. It further found that the operating revenues decreased from $25,507.68 in 1916 to $5,813.91 in 1922 and $1,788.18 for the first five months of 1923; that the number of passengers decreased from 3,711 in 1916 to 725 in 1922, and 185 in the first five months of 1923. It then specifically found "the record does not contain any assurance that future operations would show a more favorable result." (Rec., 8.)

It also found, distinguishing the Eastern Texas Case, that applicant's lines are not located and doing business wholly within the State of Colorado; that applicant is an interstate carrier, the operating results of the branch line are reflected in its accounts, and it is required to bear or make good the deficits from such operation. There was then an express finding that:

> "It clearly appears that, in the language of the Supreme Court in the case above cited (Eastern Texas Case) the large losses sustained in operating the branch lines 'would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.' "

Thereupon the Commission said:

> "Upon the facts presented we affirm the finding of our former report, 82 I. C. C. 310, and find that the present and future public convenience and necessity permit the abandonment by the applicant of the branch line in question." (Rec., 9.)

It thus appears that the Commision not only gave detailed consideration to a large amount of evidence about past operations but also took into consideration all evidence offered with regard to the possibility of development of traffic upon this branch in the future. In addition to that, it had before it the operations during what might be termed a test period, made possible by the lapse

of time between February 3, 1922, and July 13, 1923, the dates of the first and second hearings, and found from the evidence offered at the second hearing that "it clearly appeared that the improvement in operating results anticipated by the protestants at the first hearing had not materialized, and that, in the interval between the two hearings, the traffic and revenue had shown a continued and progressive decrease." (Rec., 7.)

The protestants therefore had through this test period an opportunity to show what possibilities there were of further development of traffic and the record showed and the Commission found that they signally failed to make good on their confident predictions at the first hearing that developments in progress in the mines would result in substantial traffic increase within a short time.

The Commission said in its third report:

> "While the record, as then made, (at the first hearing) disclosed that the line had been operated at a large loss for several years, the testimony of the protestants was to the effect that developments in progress would result in a substantial traffic increase within a short time"; that at the second hearing, "it clearly appeared that the improvements in operation results anticipated by the protestants at the first hearing had not materialized, and that, in the interval between the two hearings, the traffic and revenue had shown a continued and progressive decrease." (Rec., 7.)

This finding was abundantly supported by the evidence. Thus it appeared that during the year 1922 the only mines shipping any ore were the Mary Murphy mine (Geo. E. Collins, trustee) which shipped 58 cars, and the Rarius-Warrior mine which shipped 4 cars. The gross revenue to the C. & S. from these 62 cars was $1,938.29. (Sheet 3, Ex. 6a, Rec., 214.) In the first five months of 1923, the Mary Murphy mine shipped 15 cars paying the

C. & S. a gross revenue of $294.85. (Sheet 4, Ex. 6a, Rec., 214.)

The manager of the Rarius-Warrior mine had predicted at the first hearing that he would ship one car of ore per day after May 1, 1922. (Rec., 134.) The mine actually shipped four cars in over one year, the first being shipped in August, 1922. (Sheets 1 and 2, Ex. 6a, (Rec., 214.)

Despite "optimistic predictions and hopes" (Rec., 22) at the first hearing as to future tonnage (Rec., 17, 20) not another mine shipped a single car of ore between the two hearings. (Sheets 3 and 4, Ex. 6a, Rec., 214.)

Surely these facts justified the finding of the Commission at the second hearing that "it was clearly established that the improvements in operating results anticipated by the protestants at the first hearing had not materialized, and that the operation of the line since the original application was filed has resulted in a large deficit" (Rec., 22), which finding was affirmed in the final report. (Rec., 7, 9.) Thus, it was demonstrated that protestants were seeking to compel the railway company "to maintain a railroad for the benefit of others who do not care to pay for it." (*Brooks-Scanlon Co.* v. *R. R. Commission*, 251 U. S. 396, 399.)

Counsel suggest that it is not shown what specific service the State of Colorado would demand in the future and for aught that appears "it may be that one train per week will be adequate. If so, how much will it cost to operate that train and what will the revenue be? Will the net result be a profit or a loss? The record fails to disclose an answer." (Appellant's brief, page 42.) "This is merely the language of hope." (*Brooks-Scanlon Co.* v. *R. R. Com. of La. supra.*) It was singularly within the province of protestants to indicate

what future service they would regard as sufficient and this they failed to do. The case was tried upon the evident theory that the existing tri-weekly service was the minimum that would be demanded and no suggestion was ever made that less than tri-weekly service would suffice. A public convenience and necessity that could be satisfied with less than tri-weekly service would obviously not be a very pressing public necessity.

The record conclusively shows that the wages of the conductor and brakemen on this line had to be paid for on the basis of 6 days' service each week, and of the engineer and fireman, for 7 days' service each week; that the railway company was compelled to pay these wages in order to get men to operate the trains, and that any reduction in the number of trips a week would not reduce these items of expense. (Rec., 91, 96.) Maintenance of roadbed would also be a continuing expense of operation little affected by reduction in train service. This expense for several years had far exceeded the gross revenue. (Rec., 68-69, 210, 211.)

In this connection it is interesting to recall, as heretofore shown in this brief, that in recent years on this branch the wages of the engine men and train men exceeded the total gross revenues. It is evident that no possible reduction in service could possibly result in this road earning revenues that would even approach the direct out-of-pocket expense of operation, and the Commission was completely justified in holding that the record does not contain "any assurance that future operations would show a more favorable result" than the enormous deficits which had been continuously piled up from 1916. (Rec., 8.)

Counsel argue at length about the "duty of a railway company to furnish adequate facilities," but that

duty implies there is substantial tonnage traffic to be transported and a public convenience and necessity to be met. These conditions precedent to the carrier's duty to furnish facilities were found by the Commission to be wholly lacking here.

VII.

SIMILAR BURDENS HAVE BEEN FREQUENTLY ENJOINED BY THE COURTS BOTH PRIOR AND SUBSEQUENT TO THE TRANSPORTATION ACT OF 1920 AS UNDUE INTERFERENCE WITH INTERSTATE COMMERCE.

Railroad Comm. of Wis. v. *C. B. & Q. R. R. Co.* 237 U. S. 220. (Here the running of two additional intrastate passenger trains involving an annual expense of $84,000 to a railroad with approximately 10,000 miles of operated mileage was found to constitute undue interference with interstate commerce.)

See also:

Mississippi Railroad Commission v. *Illinois Central R. R. Co.* 203 U. S. 335.
Atlantic Coast Line v. *Wharton,* 207 U. S. 328.
Herndon v. *C. R. I. & P. Ry. Co.* 218 U. S. 135.
Roach v. *A. T. & S. F. Ry. Co.* 218 U. S. 159.

Since the enactment of the Transportation Act, 1920, burdens upon interstate commerce have likewise been enjoined:

Railroad Commission of California v. *Southern Pacific Company,* 264 U. S. 331. (Here an order of the California Commission, requiring three railroads to construct a union station in Los Angeles was enjoined. These railroads had a total operated mileage of 23,281 miles and

the new station would have required a minimum capital expenditure of $25,000,000, or a capital expenditure of approximately $1,000 a mile. The Supreme Court held that such a capital charge might be an undue burden upon interstate commerce, and that it was for the Interstate Commerce Commission to determine whether or not such would be the case.)

In the present case the annual net railway operating deficit on this branch line, of approximately $55,000, if capitalized at 5¾ per cent, (the fair rate of return on the value of carriers' property in groups prescribed by the Interstate Commerce Commission, pursuant to Section 15a Interstate Commerce Act) amounts to a capital sum of $956,500. This is a capital charge of approximately $956 per mile of operated line. Even if all of the taxes on this line were entirely eliminated from consideration, the remaining annual loss of approximately $30,000 a year on this branch represents, on a similar basis of computation, a capital sum of $521,700, or $474 per mile for the total operated mileage of the entire Colorado & Southern system.

See also *Davis, Director General* v. *Farmers Co-operative Company*, 262 U. S. 312. (Here a Minnesota statute permitting prosecution of suits in Minnesota against railroad companies for causes of action arising in other states, was held to be an undue burden and an unreasonable interference with interstate commerce.)

At page 317, the court said:

> "The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by the Transportation Act, 1920, which authorizes rate increases necessary to insure carriers efficiently operated a fair return on property devoted to the public use. See *Railroad*

Com. of Wisconsin, v. *C. B. & Q. R. R. Co.* 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184. Avoidance of waste, in interstate transportation, as well as maintenance of service, has become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit it unreasonably obstructs, and unduly burdens, interstate commerce."

A. T. & S. F. Ry. Co. v. *Wells*, 265 U. S. 101, decided May 12, 1924. (Here a garnishment statute of the State of Texas permitting the impounding of funds of foreign railroad corporations not doing business in that state, was held to be void as an unreasonable interference with and an undue burden on interstate commerce. The garnishment here was for the sum of $4,000 and the seizure of this credit as against the Santa Fe was held to be an unwarranted interference with interstate commerce.)

VIII.

THE COMMISSION AND THE DISTRICT COURT CORRECTLY HELD THAT THE FACTS IN THIS CASE DIFFERENTIATED IT FROM THE EASTERN TEXAS CASE, 258 U. S. 204.

Counsel for appellant argue that this case is ruled by the *Eastern Texas case*, 258 U. S. 204. They made the same contention unsuccessfully before the Interstate Commerce Commission and the District Court. It appears that the Commission in each of the three reports made by it gave full consideration to this contention and overruled it.

In the first report it said:

"Prior to the hearing the State of Colorado, by its public utilities commission, filed a motion to dismiss the proceeding on the ground that the applicant's

railroad is located wholly within the State of Colorado and therefore we have no jurisdiction to authorize its abandonment, and a hearing was held thereon. This motion was renewed at the main hearing, and like motions were made on behalf of certain of the intervening protestants. While the branch line lies entirely within the State of Colorado, it constitutes a part of applicant's system, its operating results are reflected in the accounts of the applicant, and the latter would be required to bear or make good any deficits from its operation. We are therefore of opinion that we have jurisdiction." (Rec., 16.)

In the second report it was said:

"It is further contended by the protestants that the proposed abandonment is not within the applicant's charter powers; and that paragraphs 18 to 21 inclusive of section 1 of the Transportation Act are unconstitutional in so far as they may attempt to confer exclusive jurisdiction upon this Commission to permit the abandonment of lines of railroad located and doing business wholly within the State of Colorado.

The case of *Texas* v. *Eastern Texas R. Co. et al.* 258 U. S. 204 is cited in support of the last proposition. In our opinion the conclusion therein reached does not apply to the facts in the present case. The applicant is an interstate carrier, the operating results of the branch line are reflected in its accounts, and it is required to bear or make good the deficits from such operation." (Rec., 22.)

In the third report the Commission said:

"The protestants contend that paragraphs (18) and (21), inclusive, of section 1 of the act, in so far as they may attempt to confer exclusive jurisdiction upon us to permit the abandonment of lines of railroad located and doing business wholly within the State of Colorado and engaged in its intrastate commerce, are constitutional. The case of *Texas* v. *Eastern Texas R. R. Co. et al.* 258 U. S. 204, is relied upon to support such contention. In our opinion the conclusion therein reached does not apply to the facts in the present case. The applicant's lines are

not located and doing business wholly within the State of Colorado. The applicant is an interstate carrier, the operating results of the branch line are reflected in its accounts, and it is required to bear or make good the deficits from such operation. It clearly appears that, in the language of the Supreme Court in the case above cited, the large losses sustained in operating the branch line 'would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.' We are of opinion that we have jurisdiction." (Rec., 9.)

That the Commission and lower court correctly ruled that the Eastern Texas case did not govern this case is clear. The two cases are easily distinguished. In the Eastern Texas case abandonment of the entire line was sought and that line lay wholly within the state. In this case partial abandonment only was authorized, namely: of a branch line which was part of a larger system. While the line to be abandoned lay wholly within the state it was part of an interstate system extending into other states than Colorado, that is, Wyoming and New Mexico.

Again, in the Eastern Texas case all agreed that the certificate permitted abandonment as to interstate operations whereupon the carrier ceased to be an interstate carrier and therefore no longer subject to the Interstate Commerce Act. In this case after abandonment of interstate operations on this branch the railway company would still be an interstate carrier subject to the Interstate Commerce Act.

Again, as the court properly said in the Eastern Texas case after abandonment of interstate operations continued operation in intrastate commerce would be a matter only of local concern because carried on by a purely intrastate carrier. In this case continued operation of the branch in intrastate commerce would be by an inter-

state carrier and therefore of national or interstate concern because the deficits on this branch line would be reflected in the earnings of the interstate carrier and would as found by the Commision burden interstate commerce.

Again, paragraph 22 of Section 1 of the Interstate Commerce Act provides that the only lines of an interstate carrier wholly within a state that are excluded from the operation of the abandonment provisions of the act are spur, industrial, team, switching or sidetracks, none of which designations covers the branch line in question. In the Eastern Texas case since the entire line sought to be abandoned lay within the state, upon abandonment of its interstate operations which was authorized it would cease to be an interstate carrier subject to the act at all.

IX.

A CONTRACT OR CHARTER OBLIGATION OF A CARRIER CORPORATION YIELDS TO THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE AND TO ADMINISTRATIVE ORDERS OF THE INTERSTATE COMMERCE COMMISSION ENTERED THEREUNDER.

As ground for the alleged invalidity of the Commission's order appellant contends that the railway company had an obligation under its charter from the State of Colorado to continue to operate the branch line, which charter obligation bound the hands of the Interstate Commerce Commission. This is characterized by counsel as "the main contention made by the State of Colorado in the proceedings before the Commission." (Appellant's brief, page 45.)

That a contract or charter obligation of a carrier corporation yields to the power of Congress to regulate interstate commerce and to administrative orders of the Interstate Commerce Commission entered thereunder has been held by this court in many cases. Among them are:

Louisville & Nashville R. Co. v. *Mottley*, 219 U. S. 467, at 482.

Philadelphia, B. & W. R. Co. v. *Schubert*, 224 U. S. 603, 613.

New York v. *U. S.* 257 U. S. 591, 600, 601.

In the last cited case an order of the Interstate Commerce Commission requiring the raising of intrastate passenger fares to 3.6 cents per mile in New York, to remove discrimination against interstate commerce, was upheld against attack by the State of New York, even though the New York Central Railroad Company had a charter obligation not to increase its fares to more than 2 cents a mile. At pages 600-601 this court said:

> "The next objection is that the state has a charter contract with the New York Central Railroad Company by which the latter is bound not to charge more than two cents a mile for passenger carriage between Albany and Buffalo, and that, if the Transporation Act permits the Interstate Commerce Commission by such an order to enable the railroad company to violate its contract, it impairs the obligation of a contract in violation of Section 10, Article I, of the Federal Constitution. That section provides that 'no State shall * * * pass a law * * * impairing the obligation of contracts,' and does not in terms restrict Congress or the United States. But it is said that it deprives New York and her people of property without due process of law. We said in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 230, 'Anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is

state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.' *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467. See, also, *Scranton* v. *Wheeler*, 179 U. S. 141, 162, 163; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400." (257 U. S. 591, at 600-601.)

See also *United States* v. *Village of Hubbard*, 266 U. S. 474, involving the validity of an order of the Interstate Commerce Commission requiring an interurban electric road to raise intrastate passenger fares which the Commission found subjected interstate commerce to unjust discrimination. In footnote 1, page 477, the court said:

"It was also contended that because the intrastate fares had been fixed by contract between the municipalities and the carriers (*Interurban Railway & Terminal Co.* v. *Public Utilities Commission*, 98 Oh. St. 287), Congress was without power to authorize an increase of the fares. The unsoundness of this contention was settled in *New York* v. *United States*, 257 U. S. 591."

The principle underlying these cases is obvious, namely, that the power of Congress to regulate commerce cannot be restricted by contracts between individuals or corporations, or by either of them with the state. As said in the *Mottley case, supra:*

"If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived." (219 U. S. 467, at 485, 486.)

X.

NO DUTY RESTED ON THE COMMISSION TO SEPARATE PROPERTY VALUES AND THE REVENUES AND EXPENSES OF THE RAILWAY COMPANY AS BETWEEN INTRASTATE AND INTERSTATE OPERATIONS.

Counsel for appellant contend that the order of the Interstate Commerce Commission was invalid because it had failed to separate the property values and the revenues and expenses of the railway company as between intrastate and interstate operations. This proposition has been ruled against appellant in the following cases:

Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.* 257 U. S. 563, at 587.

Dayton Goose Creek Railway Co. v. *United States*, 263 U. S. 456, at 485.

In the two cases last above cited the same objection now urged by the appellant to the Commission's order was made in respect to the orders there under review. In the first cited case the order of the Interstate Commerce Commission required the raising of intrastate passenger fares within the State of Wisconsin, over the protest of the state, to remove unjust discrimination against interstate commerce. The Supreme Court there disposed of the contention as follows:

> "Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of Section 15a to be ascertained pursuant to Section 19a of the Interstate Commerce Act (37 Stat. L. 701; amended 41 Stat. L. 493), is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the States and must be segregated from that used in intrastate commerce. This

is contrary to the construction which since the enactment of Section 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of Section 15a refutes such interpretation. The percentage is to be calculated on 'the aggregate value of the railway property of such carriers held for and used in the service of transportation.' *To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.*" (Italics ours.)

Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.* 257 U. S. 563, at 587-588.

In the second cited case the order of the Commission related to the reporting by the carrier of net railway operating income in excess of 6 per cent of the value of the railway property under the so-called "Recapture" provisions of Section 15a of the Interstate Commerce Act. On the point that the failure to separate revenues and expenses as between intrastate and interstate operations, the court said:

"The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the states and is in conflict with the Tenth Amendment. In solving the problem of maintaining efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. (Cases cited.)

> The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. *To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan.* This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which if present is indistinguishable." (Italics ours.)
>
> *Dayton Goose Creek Railway Co.* v. *United States*, 263 U. S. 456, at 485.

In the present case the Commission had evidence of the net railway operating income of the railway company since January 1, 1916. (Rec., 19, 9, 157.) For the year 1922 this was $1,061,877.35 (86 I. C. C. 393, at 395; Rec., 9, 231.)[1] Contrasted was a net railway operating deficit on this branch of $53,678.79 for 1922. (Exhibit 1A, Rec., 209.) The deficit from the branch thus constituted more than 5 per cent of the total net railway operating income of the entire system, or if taxes be disregarded and it be assumed as stated by the minority (Rec., 11) that total abandonment of the branch would not save applicant more than $30,000 a year as a maximum, the deficit would constitute nearly 3 per cent of the total net railway operating income of the entire system.

It is clearly competent for the Interstate Commerce

[1] In this connection it should be noted that counsel for appellant have twice erroneously stated this item. At page 11 of their brief they show the figure to be $1,468,057.78, and at page 35 of their brief they state it to be "almost $1,500,000." The figure taken by counsel from the record, page 229, was "railway operating income" and not "net railway operating income" which allows for debits and credits for hire of equipment and joint facilities rents, and is shown at record p. 231 to be $1,061,877.35.

Commission as a matter of administrative discretion to find that such a diminution of revenue of an interstate carrier casts a burden upon it which should be removed. No separation of revenue and expense as between state and interstate commerce would have added to or subtracted from such conclusion.

The impracticability and lack of necessity of apportioning aggregate values and revenue statistics of railway systems as between the Western Rate group and the Mountain-Pacific groups, which were given different rates, was commented on by the Interstate Commerce Commission in *Increased Rates*, 1920, 58 I. C. C. 220, 229, and in *Rates and Charges on Grain and Grain Products*, 91 I. C. C. 105, 113. Much greater would be the difficulty of making an apportionment as between state and interstate operations of individual systems and such requirement, in the language of the court above quoted, "would be impracticable and defeat the plan."

Where prior to the Transportation Act, 1920, the courts enjoined state requirements as burdens on interstate commerce they never found it necessary to separate carrier statistics as between intrastate and interstate operations.

Mississippi Railroad Commission v. *Illinois Central R. R. Co.* 203 U. S. 335.
Atlantic Coast Line v. *Wharton*, 207 U. S. 328.
Herndon v. *C. R. I. & P. Ry. Co.* 218 U. S. 135.
Roach v. *A. T. & S. F. Ry. Co.* 218 U. S. 159.
Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.* 237 U. S. 221.

Nor in similar cases subsequent to the Transportation Act, 1920, has the court found it necessary to separate

such statistics as between intrastate and interstate operations.

Railroad Commission of California v. *Southern Pacific Co.* 264 U. S. 331.

Davis, Director General, v. *Farmers Co-Operative Equity Co.* 262 U. S. 312.

A. T. & S. F. Ry. Co. v. *Wells,* 265 U. S. 101.

XI.

IN ABANDONMENT CASES PUBLIC CONVENIENCE AND NECESSITY AND BURDEN UPON INTERSTATE COMMERCE BY CONTINUED OPERATION OF PARTICULAR LINES ARE THE TESTS UNDER THE LAW—NOT ADEQUACY OF EARNINGS FROM WHOLE PROPERTY.

Counsel argue that the order is invalid because the railway company did not show that it was earning a fair return on its property as a whole. Therefore, it is said, there could be no undue burden upon interstate commerce.[1] Earnings of a carrier upon its whole property are not, however, a test under the statute or a condition precedent to exercise by the Commission of its jurisdiction over abandonment applications. The very fact that a particular line is being operated at a loss, and that the whole system shows fair earnings, demonstrates that other portions of the system, and those who pay charges for transportation, are being burdened. Aside from this, under the group system of rate making, the earnings of a particular carrier, even though excessive, are of secondary importance. Recapture is provided in such

[1] It was shown that for years applicant had fallen far short of earning 6 per cent on its investment in road and equipment. (R. 157, 226, 231.)

cases. The operation of wasteful service and maintenance of unremunerative branch lines, is, however, a vital consideration under the group system. Section 15a of the Interstate Commerce Act, specifically enjoins upon the carriers "honest, efficient and economical management" as a condition precedent to the fixation by the Commission of general rate levels. Losses from unremunerative operations not only tend to require a higher general level of rates for the group, but likewise reduce the earnings of a particular carrier which might otherwise be subject to recapture.[2] In other words, the continued existence of such burdens is at variance with the whole underlying purpose of the act. The duty of the Commission is to foster and protect the national system, and unnecessary operation of branch lines, like this one, resulting in wasteful expenditures, is in conflict with the general plan.

Conclusion.

The certificate and order of the Interstate Commerce Commission were within the scope of its statutory authority, were based upon substantial evidence and were made after full argument and consideration of the record. The operating deficit on this branch in seven years and five months was over $147,000 and the net railway operating deficit (including taxes) was over $304,000. The findings of a burden upon interstate commerce from operation of the branch and that present and future public convenience and necessity permitted the abandonment of the branch, in both intrastate and interstate commerce, were findings of fact and were therefore not reviewable

[2] "The recapture clauses are * * * the key provision of the whole plan." *Dayton-Goose Creek R. Co. v. U. S.* 263 U. S. 456, 480.

by a court, and the decree of the lower court dismissing the bill should be affirmed.

Respectfully submitted,

BRUCE SCOTT,
KENNETH F. BURGESS,
J. Q. DIER,
J. H. BARWISE, JR.,
Counsel for The Colorado & Southern Railway Company.

APPENDIX.

Paragraphs 18 to 20, inclusive, and paragraph 22 of Section One of the Interstate Commerce Act (41 Stat. L. 477):

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act * * * shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity * * * permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which * * * all or any portion of a line of railroad or the operation thereof, is proposed to be abandoned with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operated.

(20) The Commission shall have the power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate and not before, the carrier by railroad may,

without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the * * * abandonment covered thereby."

"(22) The authority of the Commission, conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

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No. 195

In the Supreme Court of the United States

OCTOBER TERM, 1925

THE STATE OF COLORADO, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE COLORADO AND SOUTHERN RAILWAY COMPANY, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR INTERSTATE COMMERCE COMMISSION

R. GRANVILLE CURRY,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

JANUARY, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 195

THE STATE OF COLORADO, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and The Colorado and Southern Railway Company, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR INTERSTATE COMMERCE COMMISSION

OPINION OF THE COURT BELOW

There was no written or reported opinion of the court below.

STATEMENT OF THE CASE

This is an appeal under the act of October 22, 1913 (38 Stat. L. 208, 220), from a final decree of the United States District Court for the District of Colorado, consisting of Circuit Judge Lewis and District Judges Symes and Phillips, dismissing a petition by the State of Colorado, appellant herein, to enjoin and set aside a certificate and order of the

Interstate Commerce Commission authorizing the Colorado and Southern Railway Company to abandon a line of railroad located in Chaffee County, Colo. Appellant in its petition seeks to have the order set aside only in so far as it applies to intrastate business on this line. (R. 6.)

The Colorado and Southern Railway Company, a corporation under the laws of the State of Colorado (R. 249), operates in interstate and foreign commerce various lines located in that State and extending beyond into Wyoming and New Mexico. (See map, Ex. 15, following R. 160.) Among the lines which it thus operates is the one the abandonment of which as to intrastate commerce is sought to be enjoined in this suit. This line extends in a southerly and westerly direction from Buena Vista, Colo., where it connects with the Denver & Rio Grande Railroad, to Romley, Colo., and includes certain trackage extending westerly from Romley to Hancock, Colo., a total distance of 29.42 miles. (See map opposite R. 60, and map, Ex. 14, following R. 160.) The line is described by the Commission as follows (R. 16 and 17):

> The branch line in question extends from Buena Vista in a southerly and westerly direction to Romley and includes certain trackage extending westerly from Romley to the Flora Bell Mine and Hancock, a total distance of 29.42 miles. It has no connection with any of applicant's other operated lines. Its eastern terminus at Buena Vista is ap-

proximately 29 miles southwest of Garos, Park County, Colo., through which point applicant's nearest operated line of railroad extends. This branch comprises a segment of a narrow-gauge line of railroad which was constructed during the years 1874 to 1882 from Denver, across the Continental Divide by means of the Alpine Tunnel, to Gunnison and the Gunnison County coal fields. This railroad was continuously operated until 1910. At that time the line between Garos and Macune, a distance of 28.84 miles, and between Hancock and Quartz, a distance of 13.57 miles, including the Alpine Tunnel, was abandoned, and operation thereover has never been resumed. A large part of the abandoned track has been washed out and destroyed. Operation of that portion of the line from Quartz to its western terminus was taken over by the Denver & Rio Grande Railroad Company and has since been and is now being operated as a part of that company's system, with the exception of that portion thereof which parallels the Denver & Rio Grande Railroad between Parlin and Gunnison, a distance of 11.64 miles, which portion has also been abandoned and parts thereof destroyed. The applicant acquired ownership of the line in 1898. It has continued to operate the branch in question from Buena Vista to Romley for the purpose of furnishing transportation facilities for certain communities, mining camps, and mines located in the mountains west of

> Buena Vista and east of the Continental Divide. The track is laid with 40-pound to 56-pound rail and the maximum grade is 4 per cent. The present service consists of a mixed train which makes the round trip three days a week. The equipment consists of one locomotive, one combination baggage car and passenger coach, and a few box, coal, and flat cars.

As to the territory served by the line, the Commission said (R. 17).

> The territory traversed by the branch is described as extremely rugged and mountainous. The principal industry is mining, but there has been a small agricultural and lumbering development. The only town of importance served by the branch is Buena Vista, with a population of 903. This town is also served by the Denver & Rio Grande Railroad. There are several small communities along the line which are not served by any other railroads. The distances from these points to another railroad range from 5.4 miles to 21.29 miles. The population of the tributary territory, including the population of Buena Vista, is estimated by the applicant at 993.

PROCEEDINGS BEFORE THE COMMISSION

The certificate and order here under consideration were entered in a proceeding instituted by an application filed by the Colorado and Southern with the Commission on September 1, 1921, for a certificate of public convenience and necessity

pursuant to section 1 (18) of the interstate commerce act (24 Stat. L. 379, 41 Stat. L. 477) authorizing it to abandon its Buena Vista-Romley line. Protests against the proposed abandonment were filed by the towns of St. Elmo and Buena Vista, by the Flora Belle Mining Company and the Mary Murphy Gold Mining Company, and by the Board of County Commissioners of Chaffee County. Appellant filed a motion to dismiss the proceeding and objected to the Commission's jurisdiction to authorize the proposed abandonment as to intrastate traffic.

Hearings were held in this proceeding in the manner prescribed by law and the Commission made three reports therein, 72 I. C. C. 315 (R. 15), 82 I. C. C. 310 (R. 21), and 86 I. C. C. 393 (R. 244). In its *first* report, dated July 28, 1922, the Commission, by Division 4, found:

> Upon the facts presented we are unable to find that the present and future public convenience and necessity permit the abandonment of the branch line of railroad in question. If the improvement in operating results, confidently anticipated by protestants, should not materialize within a reasonable period of time, the applicant may renew its application. It is not in the public interest that even a strong line like the applicant should permanently operate parts of its system that do not yield revenues sufficient to pay operating expenses and interest on the net scrap value of the property. Per-

> sons directly interested in the continued operation of the line should cooperate to the fullest extent possible with the management of the road with the view of effecting more favorable operating results. The offer of the applicant to lease the line proposed to be abandoned to protestants at a rental of $5 per year should be given serious consideration by protestants.
>
> An order will be entered denying the application. (R. 20.)

On May 19, 1923, the Commission upon petition of the Colorado and Southern reopened the case and held further hearings on July 13 and 14, 1923 (R. 167), about a year following its original report. Soon afterward the Commission, by Division 4, issued its *second* report, dated September 24, 1923, in which it said, among other things:

> The case for the protestants rests largely upon optimistic predictions and hopes. The record shows that for many years the operation of this branch line has caused the applicant a large annual loss. No definite evidence is submitted upon which a conclusion could be based as to when, if ever, sufficient traffic could be developed to pay the costs of operation. At the further hearing the applicant renewed its offer to lease the line to the protestants at a rental of $5 a year, provided they would operate it in its present condition, or to sell it to them for its scrap value.
>
> Upon the facts presented we find that the present and future public convenience and

necessity permit the abandonment of the branch line of railroad in question. A certificate to that effect will be issued. (R. 22 and 23.)

Thereafter upon petitions of protestants (R. 234, 238) the Commission reopened the proceeding and permitted the case to be reargued. Soon afterward, on February 11, 1924, it issued its *third* and final report in which it said, among other things:

> From January 1, 1916, to May 31, 1923, the operating results of the branch line were: Operating revenues $88,588.04; operating expenses, $236,185.04; taxes, $157,244.35. The record does not show how much the applicant's taxes would be reduced through the proposed abandonment. Eliminating the item of taxes, the deficit in net operating revenues was $147,597. Practically all of the operating expenses, excepting superintendence, are direct charges to the branch line. The operating revenues decreased from $25,507.68 in 1916 to $5,813.91 in 1922, and $1,788.18 for the first five months of 1923. The number of passengers carried decreased from 3,711 in 1916 to 725 in 1922, and 185 in the first five months of 1923. The record does not contain any assurance that future operations would show a more favorable result. (R. 245.)
>
> * * * The applicant's lines are not located and doing business wholly within the State of Colorado. The applicant is an interstate carrier, the operating results of the

branch line are reflected in its accounts, and it is required to bear or make good the deficits from such operation. It clearly appears that, in the language of the Supreme Court in the case above cited [Texas v. E. Tex. R. R., 258 U. S. 204], the large losses sustained in operating the branch line "would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce." We are of opinion that we have jurisdiction. (R. 246.)

* * * * * *

The applicant has offered to lease the line to the protestants at a nominal rental of $5 a year, provided they will operate it, and pay the operating expenses and taxes. The acceptance of this offer would enable the protestants to operate the line as an industry track or in any other manner acceptable to the State authorities. Our certificate herein will provide that it shall take effect and be in force from and after six months from the date it is issued.

Upon the facts presented we affirm the findings in our former report, 82 I. C. C. 310, and find that the present and future public convenience and necessity permit the abandonment by the applicant of the branch line of railroad in question. A certificate to that effect will be issued. (R. 246.)

On the same day (February 11, 1924) the Commission issued the following certificate and order:

AMENDED CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Issued February 11, 1924

A further argument and investigation of the matters and things involved in this proceeding having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, that the present and future public convenience and necessity permit the abandonment by the Colorado & Southern Railway Company of the branch line of railroad in Chaffee County, Colo., described in the application and report aforesaid.

It is ordered, That the Colorado & Southern Railway Company, when filing schedules canceling tariffs applicable on said branch line, shall in such schedules make specific reference to this certificate by title, date, and docket number.

It is further ordered, That this certificate shall take effect and be in force from and after six months from the date of its issue, and shall replace the certificate of public convenience and necessity issued September 24, 1923, in this proceeding.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

(R. 248, 249.)

PROCEEDINGS IN THE LOWER COURT

On July 15, 1924, the State of Colorado, appellant herein, filed a petition in the court below praying for an injunction to set aside the Commission's certificate and order in so far as it applies to intrastate commerce. The United States, Interstate Commerce Commission, and the Colorado and Southern were made parties defendant and each filed an answer to the petition. (R. 39, 12, 23.) The lower court, consisting of Hon. Robert E. Lewis, Circuit Judge, Hon. J. Foster Symes, and Hon. O. L. Phillips, District Judges, heard the case upon these pleadings and upon evidence introduced at the hearing, including the evidence which was before the Interstate Commerce Commission in the proceeding above referred to, and on August 18, 1924, without rendering a formal opinion, entered judgment denying the prayer for injunction and dismissing the petition. (R. 41, 45.)

APPELLANT'S CONTENTIONS

Appellant contends in substance (1) that the right to require intrastate service is a right belonging to the State and that the Commission has no authority to authorize the abandonment as to intrastate commerce of a line of railroad like the one here under consideration which lies wholly within a State and is owned and operated by a corporation which is permitted still to hold its charter under the laws of that State, and (2) that the evidence was insufficient to support the order here in issue,

because there was no showing that the railway company is not earning a fair return on the value of its properties as a whole or on the value of that portion of its property used in intrastate business in the State of Colorado, or that future operation of the Buena Vista-Romley line in intrastate commerce would require as expensive service as past operation in both interstate and intrastate commerce. It is also contended that the offer of the railway company to lease this line at a nominal rental is no ground for abandonment, and that the findings in the minority opinion should be adopted. (Appellant's brief, pp. 15-18.)

Appellant does not question that the Colorado and Southern is an interstate carrier, or challenge the validity of the Commission's certificate and order as to abandonment of interstate and foreign business on the line here under consideration.

ARGUMENT

SUMMARY

I. The Commission has authority under the interstate commerce act to permit the abandonment of the Buena Vista-Romley line as to intrastate business as well as interstate business.

(a) The abandonment provisions are part of a new scheme of railroad legislation, intended "to provide the people of the United States with adequate transportation."

(b) The *Eastern Texas case* does not support appellant's contentions, but on the contrary shows the Commission's authority to act in this case.

II. The Commission's finding that public convenience and necessity do not require operation of the line in question is supported by the evidence, is within statutory and constitutional limits, and is conclusive.

(a) The evidence shows that the Buena Vista-Romley line is "unnecessary and unprofitable" and should no longer burden the interstate transportation system of the country and the Colorado and Southern as part of it.

(b) The record does not contain any assurance that future operations would show a more favorable result, even if operation should be in intrastate commerce alone.

(c) Profitable operation of the carrier's railroad business as a whole would not warrant the continued burden of the branch line. A showing that the carrier was not earning a fair return upon its railroad properties as a whole or upon that portion used in intrastate business in Colorado was unnecessary.

III. The Commission's certificate and order do not infringe any contract or charter rights in violation of the Constitution or amendments thereof.

IV. Other contentions are without merit.

(a) The Commission's reference to the carrier's offer to lease the line at a nominal rental or to sell it for its scrap value was proper.

(b) Findings of fact in the minority opinion of the Commission are foreclosed by the findings in the majority opinion.

PERTINENT PROVISIONS OF THE STATUTE

The provisions of the interstate commerce act relating to the extension and abandonment of railroad lines are to be found in paragraphs (18) to (22), inclusive, of section 1. For convenient reference they are set forth in full in the appendix to this brief. Congress has provided in these paragraphs that

> * * * no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate

> that the present or future public convenience and necessity permit of such abandonment. (Par. (18).)
>
> * * * From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the * * * abandonment covered thereby. (Par. (20).)

The provisions quoted are expressly restricted to carriers by railroad "subject to this act," which by section 1 are those engaged in interstate or foreign commerce.

I. THE COMMISSION HAS AUTHORITY UNDER THE INTERSTATE COMMERCE ACT TO PERMIT THE ABANDONMENT OF THE BUENA VISTA-ROMLEY LINE AS TO INTRASTATE BUSINESS AS WELL AS INTERSTATE BUSINESS

(a) The abandonment provisions are part of a new scheme of railroad legislation intended "to provide the people of the United States with adequate transportation"

The abandonment provisions of the interstate commerce act, with other important provisions, were added by the transportation act, 1920, as part of a new scheme of railroad legislation "to build up a system of railways prepared to handle promptly all the interstate traffic of the country." This court has several times construed this statute and has made it plain that one of the fundamental purposes of the new legislation is the avoidance of waste in interstate transportation, as well as main-

tenance of service; that to this end the Commission has been authorized to permit the abandonment of unnecessary and unprofitable lines of interstate carriers; that such carriers are instrumentalities or agencies of interstate and foreign commerce; and that they may be dealt with by Congress as such, without separating intrastate and interstate operations.

In *Dayton Goose Creek Ry.* v. *United States,* 263 U. S. 456, 478, which involved the constitutionality of the "recapture" paragraph of the act, the new scheme of legislation is explained, in an opinion by Mr. Chief Justice Taft as follows:

> * * * the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issues of securities, their car supply and distribution, their joint use of

> terminals, their construction of new lines, *their abandonment of old lines,* and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.
>
> It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.

In holding that Congress might deal with both interstate and intrastate business as a unit, this court said at page 485:

> The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the States and is in conflict with the Tenth Amendment. In solving the problem of maintaining efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often in-

> extricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. [Cases cited.] The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which if present is indistinguishable.

In *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, it was held that the Commission had power under section 13 of the Act to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it. This court in an opinion by Mr. Chief Justice Taft said, among other things, at page 590:

> Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state

> work. The affirmative power of Congress in developing interstate commerce agencies is clear.

In the *New England Divisions case,* 261 U. S. 184, some of the new powers granted to the Commission by the transportation act to ensure adequate transportation service are pointed out by Mr. Justice Brandeis in a note on page 190. Included in these is the power of the Commission "*to authorize abandonment of unprofitable and unnecessary lines.*"

In *Davis* v. *Farmers Cooperative Company,* 262 U. S. 312, this court in an opinion by Mr. Justice Brandeis referred to "avoidance of waste" as an important purpose of the transportation act. There a state statute providing for service of an interstate carrier corporation by service upon its soliciting agent in the state was held invalid where the corporation operated no railroad lines within the state and the action arose and plaintiff resided elsewhere. After restating the purpose of the transportation act this court said, at page 317:

> * * * Avoidance of waste, in interstate transportation, as well as maintenance of service, has become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce.

See also *Railroad Commission of California* v. *Southern Pacific Company*, 264 U. S. 331, dealing with the authority of the Commission to authorize extensions of railroad tracks in Los Angeles, Calif.

(b) The Eastern Texas case does not support appellant's contentions, but on the contrary shows the Commission's authority to act in this case

The interstate commerce act as construed by this Court, we submit, clearly shows that interstate carriers, singly and as part of the interstate transportation system of the country, are to be protected, under a proper finding by the Commission, from the operation of unnecessary and unprofitable lines such as the one here involved, both as to interstate and intrastate business, and that the operation of such lines is so closely related to interstate and foreign commerce as to come within the provisions of this act and the power of Congress to regulate such commerce.

Appellant, however, relies here, as it did in the proceeding before the Commission, upon *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, to show that the Commission has no authority to permit the abandonment of intrastate business on the line in question. That is the only case in which this court has dealt with the validity of an order of the Commission under the abandonment provisions of the act. There it was held that the Commission, while having authority under section 1 of the Act to per-

mit the abandonment, as to interstate and foreign business, of a carrier's *entire line* lying in the State of Texas, could not permit the abandonment of the line as to intrastate business, because the operation of the line in intrastate commerce could not affect interstate and foreign commerce.

Since the carrier in that case had only the one line, the effect of abandonment of it as to interstate and foreign commerce was to convert the carrier from an instrumentality of interstate commerce to one of intrastate commerce only, and to divorce it from the interstate system of transportation which it was the purpose of Congress to foster and protect. The operation of the line in intrastate commerce thereafter could not affect this interstate system of transportation and could not interfere with or impose a burden upon interstate and foreign commerce. This court, in an opinion by Mr. Justice Van Devanter, took pains to point out that the carrier there involved did not operate other lines in interstate and foreign commerce, and clearly indicated that while the statute did not apply to the intrastate business there involved it would apply in a case like the one here presented.

The railroad in the *Eastern Texas case* is described in the opinion as follows:

> The Eastern Texas Railroad Company, a Texas corporation, owns and operates in that State a line of railroad 30.3 miles in length. Approximately three-fourths of the traffic

> over the road is in interstate and foreign commerce and the rest is in intrastate commerce. The company neither owns nor operates any other line. The road was constructed in 1902 to serve extensive lumber industries, but in subsequent years the adjacent timber was removed and the mills dismantled. The company claims that since 1917 the road has been operated at a loss. (P. 214.)

The difference between the abandonment of such a line, which was the only line of the railroad company, and the abandonment of a line whose unremunerative operation, if continued, must be undertaken and borne by a railroad company as an interstate carrier operating another line, was then pointed out as follows:

> The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce. (P. 216.)

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This court held that the abandonment provisions of the act were not to be construed as giving the Commission—

> authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business. (P. 218.)

The court in other words held that the effect of the subject matter upon interstate commerce was clearly nonexistent. The effect of the continued operation in intrastate commerce of such a line as the one here in question upon interstate and foreign commerce seems clear and in view of this and the plain language of the statute the court will not construe the statute as excluding the Commission from authority over intrastate business in making the order in question.

In *Stafford* v. *Wallace,* 258 U. S. 495, which involved the validity of the Packers and Stockyards Act of 1921, the court, at page 521, said:

> * * * Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that

of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

II. THE COMMISSION'S FINDING THAT PUBLIC CONVENIENCE AND NECESSITY DO NOT REQUIRE OPERATION OF THE LINE IN QUESTION IS SUPPORTED BY THE EVIDENCE, IS WITHIN STATUTORY AND CONSTITUTIONAL LIMITS, AND IS CONCLUSIVE

The rule as to judicial review of the Commission's findings and orders is stated as follows in *United States* v. *New River Co.,* 265 U. S. 533, a case involving car distribution rules as applied to joint coal mines:

> The authority conferred upon the Commerce Court by section 207 of the Judicial Code was vested in the District Courts by the Act of October 22, 1913, and, like the authority previously exercised by the Federal Circuit Courts, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. * * * (P. 540.)
>
> The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions. (P. 542.)

In *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, it was said at page 482:

> * * * It may be conceded that the evidence would have warranted a different finding; indeed, the first report of the Com-

> mission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done.

In the *New England Divisions Case,* 261 U. S. 184, this court said, at page 203:

> * * * The contention that the order is unsupported by the evidence rests largely upon arguments which assume a construction of the statute which we hold to be erroneous, or upon expressions in the first report of the Commission, which, in view of the second report and order thereon, must be deemed to have been withdrawn. That the evidence was ample to support the order made, is shown in the opinion of the lower court, 282 Fed. 306, 308, 309, and in the reports of the Commission. To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province. * * *

In the present case the Commission, after granting a full hearing to all parties in interest, made the administrative finding which the law requires,* namely, that public convenience and necessity, present and future, do not longer require the operation of the line in question, and it thus finds that

* "In orders of this kind, not including an award of damages, formal and precise findings no longer are necessary; section 14 [of the interstate commerce act] having been amended in this respect by Act of June 29, 1906 * * * ." *Manufacturers Ry Co.* v. *United States,* 246 U. S. 457, 487.

the continued operation of this unnecessary and unprofitable line in interstate and intrastate commerce is an unreasonable burden upon the Colorado and Southern as an instrumentality of interstate commerce, upon the interstate railroad transportation system of the country, and upon interstate and foreign commerce.

In its report the Commission points out that the Colorado and Southern is an interstate carrier operating other lines than the one which is here sought to be abandoned, and the substantial losses sustained in operating this line are reflected in the accounts of this agency of interstate and foreign commerce and must be borne or made good by it. (R. 246, 174, 108.) The effect of operating this line is to add these losses to the transportation burden which the public must bear in rates made under section 15a of the act, and to impair the credit and efficiency and lessen the sound financial standing of the interstate transportation system of the country and of the Colorado and Southern as part of it.

(a) The evidence shows that the Romley line is "unnecessary and unprofitable" and should no longer burden the interstate transportation system of the country and the Colorado and Southern as part of it

The Romley line closely parallels the Denver & Rio Grande for about 7 miles from Buena Vista to Nathrop and there turns westward to Mount Princeton, about 5 miles beyond. It then enters Chalk Creek Canon and continues up this canon to Romley and past it about 2½ miles to Hancock.

(R. 89, map, opposite R. 16, 90.) It " runs right around Mount Princeton. The canon the railroad follows from Mount Princeton to Hancock is rather narrow. It is of a mountainous character—high mountains on each side of the track." (R. 91.) " The grade from Mount Princeton up is continuously a very heavy grade," the maximum being 4 per cent. (R. 88.) " The altitude of Buena Vista is 7,955 feet * * * and * * * Hancock 11,017." (R. 94.) The line must operate through heavy snows in the winter (R. 96) and is subject to " both wash-ins and washouts in the summer months." (R. 96, 97, 91.)

The territory tributary to this line, with the exception of Buena Vista, which is served by the Denver & Rio Grande, has a population of only 90 persons. (R. 142, 73.) The largest town on the line with the exception of Buena Vista is St. Elmo with a population of 37 which is slightly more than half the population in 1900 (R. 93) " and is gradually dwindling down." (R. 126.)

The traffic furnished has been insufficient to enable this line to earn more than approximately one-third of its operating expenses during the 7 years and 5 months preceding the last hearing before the Commission. The total losses in operating the line during this period, exclusive of taxes amounting to $157,244.35, were $147,597. For the last calendar year during this period, namely, 1922, the operating revenues of the line were $5,813.91, operating expenses $30,654.28, and taxes $28,838.42.

Operating revenues constantly decreased from $25,507.68 in 1916 to $5,813.91 in 1922, and $1,-788.18 for the first 5 months of 1923. (R. 67, 209.) These figures are based upon tables showing actual revenues and expenses on the Romley line (R. 148, 170) and should be distinguished from those referred to in appellant's brief (p. 11) for the years 1921 and 1922. The latter are based upon the table following R. 220 which shows revenues and expenses allocated to this line on an arbitrary mileage prorata basis (R. 170), and are, therefore, of no value in considering actual operating results.

The number of passengers handled over this line decreased from 3,711 in 1916 to 185 in the first 5 months of 1923. For 1921, 1922 and the first 5 months of 1923 the passengers averaged less than 2 a day. (R. 213.)

Metalliferous mining is about the only source of traffic on the line (R. 75, 122), and this industry "has been practically lost". (R. 140, 99.) Agriculture is negligible because of the rugged mountainous character of the territory, its high altitude, short growing season, and severe winters. (R. 75, 94, Ex. 7a, following R. 215.) Cattle and sheep are pastured along the lower portions of the line, but they are driven in and out. (R. 104, 94.)

The Mary Murphy Gold Mining Company is the only company shipping anything "worth mentioning." (R. 115.) Its shipments were few in number, amounting to only 58 narrow-gauge cars of ore in 1922, or less than 5 a month. (Fol. 318, fol-

lowing R. 214, R. 194.) It " has been in arrears on the interest on its bond issues since probably 1918, and owes that bond interest and some money besides." (R. 118, 124.) Its operations are conducted by men working as " leasers," the number diminishing from about 15 (R. 113.) at the time of the first hearing in February, 1922 to about 9 at the time of the second hearing in July, 1923. (R. 197.) This mine, in the language of the witness appearing for it, produces an ore which is " refractory and heretofore impossible of real satisfactory treatment. The intimate mixture of different metallic substances in the ore makes that condition, particularly of ore with zinc. The ore that we shipped has 8 per cent zinc, but the average ore throughout the mine would have, proportionately, a much larger percentage of zinc. The smelters penalize us on account of that content of zinc." (R. 114.) The ore is shipped over the Romley line to Buena Vista and thence via the Denver & Rio Grande to the smelter at Leadville for treatment. (R. 90, 103.) " The smelter rates have been very seriously increased in the last 5 years." (R. 118.)

At the first hearing witnesses appeared in behalf of this company and the Flora Belle Mine, the Colorado Silver Mines Company, and the Rarus Warrior Mine, all located near Romley. The owner of a granite quarry 6 miles from Nathrop also testified. The case which was made, as the Commission pointed out, " rests largely upon optimistic predictions and hopes." (R. 22.) At the second hear-

ing nearly a year and a half later the results anticipated had failed to materialize.

Shipments of the Mary Murphy Mine decreased from 87 cars in 1921 to 58 in 1922. The Rarus Warrior Mine, which shipped no cars in 1921, shipped only 4 cars of ore and 5 cars of other commodities in 1922. No shipments were made by the Flora Belle Mine, the Colorado Silver Mines Company, or the granite quarry. (R. 214, Fol. 318, R. 162, Fol. 257.) The Rarus Warrior Mine had not shipped any ore for 20 years. (R. 113, 134.) No witness appeared in behalf of this mine at the second hearing. (R. 202.) The witness for the Flora Belle Mine testified that there has been "very little change" since the first hearing (R. 200); the mine has "not been at the shipping stage; 10 or 15 cars would cover all the shipments that we have made since 1906." (R. 201, 202.) The witness for the Colorado Silver Mines Company testified that conditions at the time of the second hearing were about the same as at the first hearing, "that is, at a standstill." This mine ceased operations two years before the last hearing, and for the eight years prior thereto "shipped all told between 15 and 20 carloads." (R. 204, 205.) The witness for the granite quarry admitted "I don't say how much granite I could or would produce there if I knew the railroad was going to continue in operation." (R. 188.) "I have never shipped a car of granite over the road." (R. 189.)

Irrespective of testimony by protestants as to the impractibility of hauling ore by truck, it should not be overlooked that there is a road, used by automobiles as well as wagons, from Buena Vista to Romley. This road closely follows the railroad most of the way but is several miles shorter. (R. 91, 98, 105, 128, 136-138, 202.) A stage formerly operated over the road as far as St. Elmo (about 2 miles from Romley, R. 90) even through the winter. (R. 125.)

In appellant's brief (p. 10) the mines in Grizzly Gulch, Tincup, and Taylor Park districts are referred to as served by this line. No witness appeared in behalf of any of these mines. The record shows that they do not, and cannot reasonably be expected to, ship any traffic over the line. (R. 118, 162, Fol. 257.)

The facts before the Commission clearly showed that this was an unnecessary and unprofitable line and one which it was the purpose of Congress to prune from the interstate transportation system of the country.

(b) The record does not contain any assurance that future operations would show a more favorable result even if operation should be in intrastate commerce alone

Appellant contends that the Commission's finding that " the record does not contain any assurance that future operations would show a more favorable result" is unsupported because the line in the past has been engaged in interestate and for-

eign commerce as well as in intrastate commerce and it has not been shown that operation of the line in the future in intrastate commerce alone would require the same number of trains as in the past (pp. 41–43). The theory apparently is that reductions in service if the line were operated only in intrastate commerce might "show a more favorable result." Neither the appellant nor any other protestant, although having full opportunity to do so, offered any evidence in support of this theory. The carrier's evidence, however, shows it to be without merit.

The carrier operates on this line only one engine (R. 90, 98), which, with several cars, including a combination freight and passenger coach, makes three trips from Buena Vista to Romley and back a week (R. 86, 97). The trip from Romley beyond to Hancock is made only "occasionally" (R. 90) and when "there is freight to go" (R. 95). The carrier has only one station agent on the line, who is located at Buena Vista. (R. 90.) The engine and train employees must be paid the wages which they receive "in order to get men to operate the trains" regardless of the number of trips they make. (R. 91, 96, 83.)

The expenses of the line are necessarily great. The grade is very steep. (R. 88.) The tracks have sharp curves. (R. 89.) Only 110 gross tons can be hauled upgrade and "is the safety limit * * * coming down." (R. 94.) The operation

is difficult and expensive because of snows, floods, and slides. (R. 91, 96, 97.) Over half of the line is laid with 40-pound rails which "have been there for a long time" and would soon need renewal. (R. 90, 98.) There are 20 bridges to be maintained. (R. 92.) Large expenditures are necessary for replacing worn-out ties although, as testified by a witness for the carrier, "It has been the object of the company to keep that line safe for the amount of business that is done over it, putting in just as few ties, of course, as we can and still operate with safety." (R. 91.)

The entire revenues of this line, with the advantage of interstate business as well as intrastate business, were substantially less than the maintenance-of-way-and-structures expenses alone (R. 211) and were barely sufficient to pay only the wages of the engine crew (R. 210, 211, 142).

There is clearly no hope for the line on appellant's theory of diminished service.

(c) Profitable operation of the carrier's railroad business as a whole would not warrant the continued burden of the branch line. A showing that the carrier was not earning a fair return upon its railroad properties as a whole or upon that portion used in intrastate business in Colorado was unnecessary

The authority of the Congress and its agency, the Commission, to deal in a case like the present one with the business of an interstate carrier as a unit without separating interstate from intrastate business is well settled. See quotation from the

Dayton Goose Creek case, supra. See also *Minnesota Rate Cases,* 230 U. S. 352, 432, 433; *Illinois Central* v. *Behrens,* 233 U. S. 473, 477; and the *Wisconsin case,* 257 U. S. 563, 589, *supra.* In none of the numerous abandonment cases which the Commission has passed upon has it required a separation of property to show whether there was a fair return upon the portion devoted to intrastate service. In the *Wisconsin case,* 257 U. S. 563, *supra,* this court in commenting upon the duty of the Commission as to separating property used in such service said, pages 587, 588:

> Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of section 15a to be ascertained pursuant to section 19a of the Interstate Commerce Act (37 Stat. 701; amended 41 Stat. 493), is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the States and must be segregated from that used in intrastate commerce. This is contrary to the construction which since the enactment of section 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of section 15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in

> the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.

The Commission had authority to determine, under the administrative powers vested in it by Congress, that this wasteful and unnecessary burden need not longer be imposed upon the interstate transportation system of the country and upon the Colorado and Southern as part of this system, and that it should not be added to the total expenses which shippers are required ultimately to pay in rates made under the provisions of the act.

Whether the carrier's business as a whole was profitable or unprofitable, public convenience and necessity did not require the continued operation of such a line and did not justify this wasteful drain, even though it be assumed that the Commission, under the doctrine of *Ft. Smith Light & T. Co.* v. *Bourland,* 267 U. S. 330, has authority to order services which may be attended by some pecuniary loss. The Act contemplates that the interstate transportation system of the country as a whole, as well as the individual carriers composing it, shall be fostered and protected. Under the "key provision" of the plan set up by Congress to accomplish this purpose, the wasteful and un-

necessary operation of a line such as the one here under consideration imposes a burden upon interstate commerce and its instrumentalities, even though the individual carrier may earn in excess of the return provided for in section 15a. Concerning this plan, this court in the *Dayton Goose Creek case, supra,* page 479, said:

> * * * The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. Those who earn more must hold one-half of the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

The monthly reports showing the income of the Colorado and Southern for the first 11 months of 1923, to which appellant objects on the ground that they were not in evidence, are, in view of what has been said, immaterial and clearly nonprejudicial.

If the question here were whether the Commission had authority to authorize the building of this

line in the first instance under the circumstances shown and as to whether its authority extended over the issuance of securities for such a purpose, would it be contended that the Commission is powerless to protect this interstate carrier and the interstate transportation system of the country from such an unnecessary and wasteful expenditure? In this connection the following quotation from the opinion of the Supreme Court in the *Los Angeles Union Station Case, supra,* 264 U. S. 331, is of interest:

> The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate functions is further shown in Section 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of Section 20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds or other evidence of indebtedness and forbids approval unless the Commission shall find that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier and will not impair its ability to perform that service. This is of course *in pari materia* with the restriction of paragraph 21 of Section 402 [concerning extensions] to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties. (P. 347.)

The administrative finding by the Commission in the proceeding before it and the certificate and order based thereon, we submit, are clearly within the statutory authority vested in it by the interstate commerce act, are abundantly supported by the evidence, and are not beyond the power of Congress. The courts will not consider the weight of the evidence or the wisdom of such an order, and will not substitute their judgment for that of the Commission as to such a finding. The certificate and order are, therefore, valid and should be sustained.

III. THE COMMISSION'S CERTIFICATE AND ORDER DO NOT INFRINGE ANY CONTRACT OR CHARTER RIGHTS IN VIOLATION OF THE CONSTITUTION OR AMENDMENTS THEREOF

Whether or not the Colorado and Southern has contract or charter obligations under the laws of Colorado to operate its properties during the life of its charter, interference with such rights, resulting from the exercise of authority by the Commission under a statute enacted under the power of Congress, as in this case, would not be a taking of the property of the state or its people without due process of law.

In *New York* v. *United States,* 257 U. S. 591, the State of New York contended that an order of the Interstate Commerce Commission requiring the removal of discrimination against interstate commerce by a horizontal increase of intrastate passenger fares violated a charter fare-limiting con-

tract between the State and the New York Central Railroad and was, therefore, unconstitutional and void. The court in overruling this contention said at page 601:

> * * * But it is said that it [the order] deprives New York and her people of property without due process of law. We said in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 230, " Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce." *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467. See also *Scranton* v. *Wheeler,* 179 U. S. 141, 162, 163; *Union Bridge Co.* v. *United States,* 204 U. S. 364, 400.

In the *Mottley case* referred to in this quotation the court in holding invalid a contract granting free transportation as compensation for personal injuries, because in conflict with the anti-pass provisions of the act to regulate commerce, which were later enacted, said at page 482:

> * * * The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agree-

ment unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable.

IV. OTHER CONTENTIONS ARE WITHOUT MERIT

(a) The Commission's reference to the offer of the carrier to lease the Buena Vista-Romley line to protestants at a nominal rental or to sell it to them for its scrap value was proper. It, at least, showed that the carrier attempted to do what it could to protect those who claimed to be interested. (R. 143, 180, 208.)

(b) The findings of fact in the minority opinion of the Commission are foreclosed by the findings in the majority opinion. In *Interstate Commerce Com'n* v. *D. L. & W. R. R.*, 220 U. S. 235, this court, speaking through Mr. Chief Justice White, said:

> This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court because they were foreclosed by the opinion of the Commission. (P. 251.)

CONCLUSION

In the new scheme of regulation which Congress has provided in the 1920 amendment to the interstate commerce act, the Commission is vested with many important administrative powers to the end that the interstate carriers of the country may be fostered and protected as effective instrumentalities of interstate commerce and saved from incurring expenses which will lessen their ability to perform well their interstate functions. One of the most important administrative powers thus vested in the Commission is that of protecting these carriers from operating unnecessary and unprofitable lines, whether the business on such lines happens to be all interstate traffic, partly interstate and partly intrastate traffic, or all intrastate traffic.

In performing this administrative duty in the present case, the Commission has acted cautiously and deliberately, has given full opportunity to all parties in interest to be heard, and upon consideration of the evidence presented and with appropriate regard for the welfare of the persons immediately affected as well as the public at large has made its administrative finding and issued its certificate and order. In doing this the Commission acted clearly within the authority lawfully conferred upon it by Congress and in furtherance of the new scheme of railroad legislation enacted to ensure an adequate railroad transportation system for the country.

We respectfully submit that the decree of the District Court should be affirmed.

R. GRANVILLE CURRY,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

APPENDIX.

Paragraphs (18) to (22), inclusive, of section 1 of the Interstate Commerce Act as amended by Transportation Act, 1920 (24 Stat. L. 379, 41 Stat. L. 456, 477, 478), read as follows:

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other

matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certifi-

cate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or

facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission, conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

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